IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 245

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

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BRIEF FOR THE PETITIONER.

Opinions Below.

The opinion of the Court of Appeals (R. 183) is reported at 330 F. 2d 128. The dissenting opinion of Circuit Judge Cameron (R. 187) begins at 330 F. 2d 133. The opinion of the United States District Court for the Southern District of Alabama (R. 170) is reported at 203 F. Supp. 915, with that portion of the Opinion which was reversed by the Court of Appeals and which concerns the issue before this Court beginning at 203 F. Supp. 928. (R. 170)

Jurisdiction.

The judgment of the Court of Appeals was made and entered on March 30, 1964. (R. 192) Petition for Rehearing

was filed on April 20, 1964 (R. 193) but was denied by that Court on May 4, 1964. (R. 199) The Petition for a writ of Certiorari was filed with this Court on July 2, 1964, and was granted on December 7, 1964. (R. 200) The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Question Presented.

Whether the tax cost basis of vessels purchased by Petitioner prior to the enactment of the Merchant Ship Sales Act of 1946 and whose original purchase price to Petitioner was "adjusted" downward pursuant to Section 9 of that Act, is the economic investment of Petitioner in the vessels, represented by their original purchase price to Petitioner, less the amount of that price adjustment, as determined under the provisions of Section 113(a) of the Internal Revenue Code of 1939.

Statutes Involved.

The statutory provisions involved are Sections 23(1) and (n), 113(a) and (b) and 114(a) of the Internal Revenue Code of 1939, 26 U. S. C. (herein referred to as the "Code") and Sections 3 and 9 of the Merchant Ship Sales Act of 1946, c. 82, 60 Stat. 41 (herein referred to as the "Act"), 50 U. S. C., Appendix, Section 1735 *et seq.*, which statutory provisions are printed in Appendix A, *infra*. The pertinent sections of the Regulations issued by the United States Maritime Commission (now Federal Maritime Board but herein referred to as "Maritime"), pursuant to Section 9 of the Act, are Sections 299.66 and 299.133,[1] which are printed in Appendix A, *infra*, A-11.

[1] 46 C. F. R., Part 299, Subpart E and Subpart G as published in General Order 60, Revised, 22 F. R. 11103, December 31, 1957; originally published in 11 F. R. 4459, April 23, 1946 as Sections 299.51 and 299.87.

Statement.

Petitioner is a common carrier for hire by water engaged in foreign commerce and has been so engaged since its incorporation in 1919. During the period January 1, 1941 through March 7, 1946, Petitioner purchased from Maritime 18 vessels. (R. 41; R. 163)[2]

Each of these vessels was purchased by Petitioner from Maritime under a Contract. (R. 52) Contract No. MCc-40639 between Maritime and Petitioner for the purchase of the vessel *Fairport* (Exhibit 24 to Petitioner's Exhibit G; R. 76, 78) is one such Contract and is fairly representative of the Contracts by and between Petitioner and Maritime for the purchase of the other 17 vessels (see Contract for HASTINGS, Exhibit 28 to Petitioner's Exhibit G; R. 76, 117). ARTICLE 3 of such Contract sets out the purchase price of the particular vessel (R. 80) and ARTICLE 4 provided for the time and method of payment of the purchase price for such vessel. (R. 80-82) ARTICLE 12 of such Contract was entitled "Future Legislation" and provided as follows (R. 86):

> "ARTICLE 12. Future Legislation. The Commission agrees that in the event of the enactment of legislation authorizing the sale by the United States of vessels, constructed or sold under conditions

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[2] Actually, on March 7, 1946 Petitioner was a party to a contract with Maritime to purchase a vessel—the *John B. Waterman*—which was then under construction but which was not delivered until March 11, 1946. R. 163. Although the *John B. Waterman* was not delivered to Petitioner until March 11, 1946, it will be treated hereunder as if all actions on that date had occurred on March 7, 1946.

similar to the construction and sale of the Vessel herein agreed to be sold, at a price less than the actual construction cost thereof, exclusive of the cost of national defense features installed in any such vessel, the Buyer shall be granted the benefit of such legislation with respect to the sales price of the Vessel, in which event the Commission shall make an appropriate *adjustment* with the Buyer *on the purchase price of the Vessel*" (Emphasis added).

The same or similar provisions were contained in the other such Contracts. (R. 118, 124 and 169)

For all eighteen vessels so purchased by Petitioner from Maritime, Petitioner agreed to pay as the aggregate purchase price the sum of $49,582,767.02. (R. 41)[3]

At the times of the original purchases of the eighteen vessels, Petitioner paid $6,449,107.02 in cash and was allowed a credit of $2,609,600 for four vessels traded in and delivered to Maritime on the original purchase price. Petitioner gave a mortgage to the United States of America as security for the balance due on the purchase price of each vessel, which mortgages aggregated, for the eighteen vessels, $40,524,060.00. (R. 41)[4] The mortgages given by the Petitioner to the United States on the *Fairport* (Exhibit 25 to Petitioner's Exhibit G; R. 76, 87) and on the *Hastings* (Exhibit 29 to Petitioner's Exhibit G; R. 76, 125) are representative of the mortgages given by Petitioner to the Government on each of the eighteen vessels purchased during this period.

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[3] The purchase price of each of the eighteen vessels is indicated on line No. 1 of Exhibit B to Exhibit S-3 of Petitioner's Exhibit F (R. 51, 63, 65 and 67) and Defendant's Exhibit 1. (R. 161-3) See computation I, Appendix E, *infra*, E-1.

[4] The cash payment on each of the eighteen vessels, the trade-in allowance allowed on four of the vessels, and the amount of the original mortgage indebtedness on each vessel is set out in Defendant's Exhibit 1. (R. 161-163)

Upon delivery of sixteen of the eighteen vessels so purchased by Petitioner, the latter immediately chartered each of the vessels to the Government. (R. 41) The Bareboat Charter of the *Hastings* between Petitioner and the War Shipping Administration, Contract No. WSA-8884 (Exhibit 59 to Petitioner's Exhibit G; R. 76, 152), is fairly representative of the charters under which the other 15 vessels were chartered by Petitioner to the War Shipping Administration.

From the date of purchase of each of the eighteen vessels through March 7, 1946, Petitioner made additional cash payments to the Government in reduction of the mortgage indebtedness on the said vessels, in the aggregate amount of $9,786,339.19, leaving a balance due on the mortgage indebtedness as of that date, of $30,737,720.81. (R. 41) As of March 7, 1946, the adjusted basis of the eighteen vessels claimed by Petitioner, approved by the Internal Revenue Service and stipulated herein was $47,149,043.42 (after adjustment of unrecognized gain on the four vessels traded in and prior to certain other adjustments not in controversy in this matter). (R. 41)[5]

On March 8, 1946, Congress enacted the Act. Section 9 of the Act (Section 1742, Tit. 50, App., 1952 ed.) provides in general that a citizen of the United States, such as Petitioner, who owns a vessel, such as the eighteen then owned by Petitioner, shall "be entitled to an adjustment in the price of such vessel under this section" if he makes application within such time and in such form and manner as

[5] No gain was recognized for tax purposes on the trade-in of the 4 vessels by reason of Section 510(e) of the Merchant Marine Act, 1936, 46 U. S. C. Section 1060(e) (1952 ed.). The total adjusted basis of the 4 vessels traded in was $175,876.40 at the time they were traded in, which became a part of the adjusted basis of the vessels for which traded (Petitioner's Exhibit F, Par. 1, R. 40, 41). See computation II in Appendix E, *infra*, E-1.

prescribed by Maritime. Petitioner made such application on May 31, 1946 for adjustment in price of the eighteen vessels in question. Pursuant to that Application and the Regulations of Maritime, Petitioner and Maritime entered into an "Interim Agreement" on December 30, 1946 for an interim adjustment in the purchase price of the eighteen vessels, Contract No. MCc-42281 (Exhibit S-1 to Petitioner's Exhibit F; R. 40 and 42).[6] This Agreement found that "The Applicant is lawfuly entitled to an adjustment in the price of the vessels, pursuant to the provisions of Section 9 of the Act".[7]

By letter of January 3, 1951, Maritime forwarded certain schedules to Petitioner for its review and concurrence.[8] On June 11, 1951, Petitioner and Maritime entered into a "Final Agreement," in the form of Addendum No. 1 to Contract No. MCc-42281, entitled "Final Agreement for Adjustment for Prior Sales Pursuant to Section 9 of the Merchant Ship Sales Act of 1946." (Exhibit S-3 to Petitioner's Exhibit F; R. 40, 43 and 51-73)

Pursuant to the Act and to that Contract, the purchase price of the eighteen vessels was to be, and was, adjusted under the provisions of Section 9 of the Act, as of March 8, 1946. Pursuant to that Contract, Petitioner made a cash payment to the Respondent of $86,037.70 (R. 57), and the aggregate mortgage indebtedness of Petitioner to Respondent on the eighteen vessels was adjusted to $10,182,779.04.

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[6] Exhibit S-1 to Petitioner's Exhibit F, is not a part of the Record printed in this Court. However, by stipulation of the parties here, it was certified to this Court by the Clerk of the Trial Court and is printed in Appendix D, *infra*, D-1.

[7] Appendix D, *infra*, D-1 and D-2.

[8] Exhibit S-2 to Petitioner's Exhibit F (R. 40 and 43) is not a part of the Record printed in this Court. However, by stipulation of the parties here, it was certified to this Court by the Clerk of the Trial Court and is printed in Appendix D, *infra*, D-18.

(R. 57) Thus, as of March 8, 1946, Petitioner had paid to the Government $16,315,483.91 in cash, had been credited on the purchase price of the vessels with $175,876.40, as the adjusted basis of the four vessels traded in, and owed the Government in the aggregate for the mortgages on the eighteen vessels, $10,182,779.04. (R. 49) The aggregate of these cash payments, trade-in allowances and mortgage indebtedness, as of March 8, 1946, was stipulated to be $26,680,139.35. (R. 49) It is this amount which Petitioner contends becomes the adjusted basis of the eighteen vessels for tax purposes under Section 113(a) of the Code, reflecting the tranaction under which Petitioner's purchase price was adjusted as of March 8, 1946.

The aggregate "statutory sales price"[9] of the eighteen vessels established by Maritime under the provisions of Section 9 of the Act, as defined in Section 3(d) of the Act (Section 1736, Tit. 50 U. S. C., App., 1952 ed.) was

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[9] The term will be often referred to and can be confusing if its meaning and usage be not initially understood. The term is defined in Section 3(d) of the Act, when applied to a dry cargo vessel, as "an amount equal to 50 per centum of the postwar domestic cost of that type vessel." However, this is subject to certain adjustments but in no case will such adjustment result in a statutory sales price "less than 35 per centum of the domestic war cost of vessels of the same type." Thus the term is used to mean an amount both before and after certain adjustments.

The definition is also used as a legislative drafting technique for two different usages. First, and most important from the principal purpose of the Act, Section 4(a) authorizes any citizen to apply to purchase a vessel at the statutory sales price. In this context, the "statutory sales price" is the price at which a vessel would be *actually* sold *subsequent* to the enactment of the Act.

The second usage, and the one applicable in a situation such as Petitioner's, in which an adjustment in original purchase price was to be made on a vessel *actually* purchased *prior* to the enactment of the Act, is quite different. In this latter context, the "statutory sales price" is employed as a convenient method of stating an amount to be utilized for measuring and determining various items in the complicated adjustment formula set out in Section 9. Most importantly, *no sale* is *actually made* under the Act under this circumstance.

$17,997,981.84. (Par. 8(a), Petitioner's Exhibit F, R. 40, 44)[10] The Government contends that this statuory sales price (regardless (1) of the actual amount of the payments made by Petitioner to Respondent under the original Contracts for the purchase of the eighteen vessels as amended by the Final Agreement by which the adjustment in price on the eighteen vessels was mutually agreed upon pursuant to Section 9 of the Act and (2) of the obligations of Petitioner to make subsequent payments on the adjusted mortgage indebtedness on all eighteen vessels under the Final Agreement) was the "cost" of these vessels to Petitioner and, therefore, the basis of these vessels for tax purposes to Petitioner. (R. 49)

The question involves the annual amount of depreciation on the 18 vessels to which Petitioner is entitled under the Code. The tax years in question are 1947 through 1950. Petitioner paid its taxes for the years in question based on a lower depreciation resulting from the lower statutory sales price basis and sued for refunds, claiming that it was entitled to the greater depreciation based on its actual cost basis in the vessels after the adjustment in purchase price.[11]

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[10] See also line 13, Exhibit B to Exhibit S-3 to Petitioner's Exhibit F. (R. 40, 64, 66 and 68)

[11] The cost basis claimed by Petitioner for four of the vessels (*Afoundria, Jean LaFitte, Wacosta and Warrior*) is less than the statutory sales prices, but the cost basis claimed for the remaining fourteen vessels is greater than the statutory sales prices, resulting in a claimed total cost basis of the eighteen vessels of $26,680,139.35, which is greater than the total statutory sales prices. The District Court held that Petitioner was entitled to a refund of Federal income taxes for the years in question by reason of a recomputation of the depreciation deductions allowable with respect to the vessels based on the higher sum as their cost basis for tax purposes. Petitioner sold one of the vessels (Warrior) on September 28, 1948; therefore, increased depreciation deductions are sought for all eighteen of the vessels from January 1, 1947 through September 28, 1948, and for the remaining seventeen vessels from September 29, 1948, through December 31, 1950. (Par. 13, Petitioner's Exhibit F, R. 40 and 49-50)

Summary of Argument.

The Court of Appeals erred in determining that the tax basis of the 18 vessels owned by Petitioner, whose original purchase price was adjusted under Section 9(b) of the Act, was the arbitrarily determined and artificial statutory sales price for such vessels under the Act, rather than the actual economic cost of these vessels to Petitioner determined under the normal Code rules, i.e., the original undisputed cost of the vessels less the undisputed adjustment thereagainst under Section 9(b) of the Act.

The basis of the 18 vessels for tax purposes immediately prior to the date of enactment of the Act is not in dispute and was stipulated by the parties. Although the Government contends, in effect, that the Act is a tax statute, it does not point to any specific provision of the Act which clearly establishes the tax basis of a vessel whose original purchase price is adjusted thereunder. Petitioner claims that not only was the Act not a tax statute but, by failing to provide for the tax basis of such vessel, Congress left the determination of such basis to the rules usually followed under the Internal Revenue Code of 1939.

It is well settled that, in determining the basis of property under Section 113(a) of the Code, the actual economic cost of the property to the taxpayer (i.e., the value of the property given up by the taxpayer for the property purchased plus the amount which the taxpayer obligates himself to pay) constitutes his cost basis of the property. It is undisputed, in fact it is stipulated, as to the amount of cash payments made by the taxpayer on the purchase price of the vessels up to the date of enactment of the Act, the value of the property, adjusted for tax purposes, which the taxpayer gave up for the property

purchased, and the amount which the taxpayer was obligated to pay on the purchase price immediately prior to the enactment of the Act. It is also undisputed and stipulated as to the adjustment made on the original purchase price of the 18 vessels under Section 9(b) of the Act. The controversy arises solely from the tax effect of this adjustment. Petitioner contends that such adjustment (whether carried out as a cash payment or credit, or as an adjustment to the obligation to pay, or as a combination of the two) shall simply be subtracted from the previous payments made and from the balance remaining on the original obligations to pay (the original cost basis) to get the new economic cost of these vessels and, therefore, their new tax basis to Petitioner.

Section 9(b) in eight numbered paragraphs thereunder sets out a complete and indivisible formula for determining the adjustment in purchase price. The statute is clear that the adjustment is to be made by applying each of the eight paragraphs. There is nothing in the language, in the structure or in the legislative history of Section 9(b) that would specifically, or by inference, allow or require the adjustment under that subsection to be otherwise determined.

The lower courts who have ruled for the Government on this question[12] erroneously interpreted the clear and

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[12] This same question has been before three District Courts and the Court of Claims. *Barber Oil Corporation* v. *Manning*, 135 F. Supp. 451 (D. N. J. 1955) (herein for convenience referred to as "*Barber Oil*"); *Socony Mobil Oil Co.* v. *U. S.*, consolidated with *Texaco, Inc.* v. *U. S.* and *Mississippi Shipping Co.* v. *U. S.*, 287 F. 2d 910 (Ct. Cls., 1961), rehearing denied, 289 F. 2d 326 (1961) (herein for convenience referred to as "*Socony*"); *Waterman Steamship Corporation* v. *U. S.*, 203 F. Supp. 915 (S. D. Ala. 1962); and *National Bulk Carriers, Inc.* v. *U. S.*, 214 F. Supp. 585 (D. Dela., 1963) (herein for convenience referred to as "*National Bulk*"). In the *Barber Oil*, *Socony* and the instant case, judg-

unambiguous language and structure of Section 9 of the Act and by inference and implication, arrived at by reasoning back from an erroneous conclusion, made one formula and one adjustment into several formulae and adjustments with differing purposes and effects.

Since Section 9(b) of the Act is clear and unambiguous as to its application and effect, resort by the lower courts to the legislative history or environment of the Act was not only not necessary but under the circumstances erroneous. However, if resort to such extrinsic aids was proper, it was only for the limited purpose of showing conclusively that the clear wording and structure of the Section was *not* as it appeared. If this legislative history confirmed, or merely raised doubts as to, the meaning and effect of the Section drawn from a literal reading thereof, then the conclusion drawn from such literal interpretation of the Section itself would stand.

If reference to legislative history was proper, Petitioner maintains that the legislative history of this particular Act,

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ment in the trial court was for plaintiff taxpayer, while in the *National Bulk* case judgment was for the Government. No appeals were taken in the *Barber Oil* and *Socony* cases. The Government appealed in the instant case and the taxpayer appealed in *National Bulk* on this issue. Both Courts of Appeals ruled in favor of the Government on these appeals. *U. S.* v. *Waterman Steamship Corporation*, 330 F. 2d 128 (5th Cir., 1964), reversing with one judge dissenting; *National Bulk Carriers Inc.* v. *U. S.*, 331 F. 2d 407 (3rd Cir., 1964), affirming. Herein for convenience the Delaware District Court (Judge Wright) will be referred to as the "Delaware Court" and the Alabama District Court (Judge Thomas), as the "Alabama Court." Petitions for Writs of Certiorari were applied for in the instant case and in *National Bulk*. Petition was granted in this case and is pending in *National Bulk* (No. 246). As pointed out in Petitioner's Petition for Writ of Certiorari filed in this Court (at p. 9), four other known cases are pending with the identical issue, two in the Court of Claims and two in the Tax Court of the United States, and a substantial number of other taxpayers are faced with this same question but have not yet instituted litigation.

including prior and similar bills considered, the Committee reports thereon, and the changes in and amendments to the various bills considered and culminating in the Act, clearly supports Petitioner's position as to the application and effect of Section 9(b) of the Act. Congress considered and rejected other bills which, if adopted, would have had the effect which the Government seeks for this Act, including one that contained a specific provision that would have established the basis of a vessel, whose original purchase price was adjusted under the Act, at the statutory sales price, the result sought by the Government under the Act but without such a provision. Under these circumstances, the Delaware Court and the Courts of Appeals were in error in finding a specific Congressional intent that the statutory sales price would be the tax cost or basis for such vessels.

The Fifth Circuit erred in basing its opinion on, and choosing to follow, the reasoning of the Delaware Court, rather than the carefully reasoned analysis of the Act and of its legislative history as contained in the opinions of the Alabama Court that initially determined this case and the issue in this case in favor of Petitioner and of the Court of Claims in the *Socony* consolidated cases. The lower courts (1) misconstrued completely the effect of the amendment proposed on the floor of the House of Representatives to Section 9(b) and the explanation thereof on the floor of the House in the debates thereon, which amendment was in the main embodied in the Act as enacted; (2) relied on committee reports that concerned a Section 9(b) that was materially different from that contained in the Act as enacted; and (3) ignored the fact and the effect, of the rejection or omission of provisions in bills considered by Congress which would have specifically provided for the tax effect found by the lower courts, and contended for by the Govern-

ment, thereby erroneously making Section 9 of the Act into a law which had been considered but rejected by Congress.

Further, as a result of their studies of the legislative history of the Act, these lower courts chose to ignore entirely the unity of the formula provided in Section 9(b) and instead treated the paragraphs under that subsection as requiring two separate computations, and, therefore, a radically different tax effect, instead of the one computation clearly contemplated and provided. This error undoubtedly stemmed from a basic misunderstanding of the intent and, therefore, of the effect, of the Act as to pre-Act and postwar purchasers of vessels under the Act. Not only did the Act not equalize such purchasers in every respect, which was impossible of attainment, but there is nothing to indicate that, so far as the tax basis of vessels purchased by the two different classes of purchasers was concerned, there was an intent that the tax basis be the same or that such basis be determined other than under the normal rules applied in the same manner to both classes of purchasers.

If, however, despite the clear wording of the statute and the prior or contemporaneous legislative history, there still remains any doubt as to the application and effect of, and Congressional intent with regard to, Section 9(b), then the subsequent legislative history of Section 9(b) of the Act decisively supports Petitioner's position. As soon as the Internal Revenue Bureau took the position, which the Government argues here, that the tax basis of a vessel, whose original purchase price was adjusted under the Act, was the statutory sales price, legislation was introduced in the Congress to make clear that the adjusted purchase price, and not the statutory sales price, was the proper cost basis of such vessel. The Committee reports in support of this legislation clearly indicated that it was not the *original* intent of the Congress that the statutory sales price be such

cost basis. These reports were made by the Committees of both Houses which had similar jurisdiction to those which had previously considered, over a long period, the legislation which culminated in the Act. The fact that this legislation, when adopted, was vetoed by the President does not impair or make irrelevant such legislation and such legislative history as evidence of the intent of Congress on the issue at hand.

Argument.

1. Internal Revenue Code principles require tax cost basis to reflect true economic cost of property to taxpayer as its basis for computation of allowable depreciation.

(a) Tax cost basis of vessels to Petitioner prior to enactment of Act is not in dispute and was stipulated.

On March 7, 1946, Petitioner was the owner of 17 vessels and the party to a contract with the Government to purchase an 18th vessel, each of which had been purchased from the Government by a separate contract. Each of these vessels had been paid for, partly in cash (and, as to four of the vessels, partly by a trade-in allowance) and the balance of the purchase price remaining due on each was evidenced by a series of 20 notes in equal amounts, payable in the succeeding 20 years after the date of purchase, and secured by a preferred ship mortgage. Sixteen of the eighteen vessels had been chartered to the Government upon purchase. Through March 7, 1946, Petitioner had been paid charter hire by the Government on the 16 vessels chartered to it in the aggregate amount of $13,430,430.94.[13]

[13] Line 7, Sheet 5, Exhibit B to Exhibit S-3 to Petitioner's Exhibit F (R. 40, 63 and 67)

The 18 vessels in question undoubtedly belonged to Petitioner, subject only to Petitioner's paying the notes when due and fulfilling its other obligations required and secured by the mortgages on each of the vessels. The original contract of purchase on each vessel provided that, in the event of enactment of legislation authorizing the sale by the Government of vessels constructed or sold under conditions similar to the construction and sale of the vessels purchased by Petitioner from the Government at a price less than the actual construction cost of such vessel, Petitioner would be granted the benefit of such legislation with respect to the sales price of the vessels to it, and, in that event, the Government "shall make an *appropriate adjustment* with the Buyer *on the purchase price of the Vessel*". (R. 86 and 124) Also, the charter hire paid by the Government and received by the Petitioner on the 16 vessels had been paid and received in accordance with the charters then in effect and were held as a matter of right by Petitioner and such charter payments had been commingled with, and become a part of, the capital assets of Petitioner.

The parties hereto stipulated and the Alabama Court found as a matter of fact, which finding was recognized by the Fifth Circuit, that the tax basis of the 18 vessels to Petitioner on March 7, 1946, was $47,149,043.42. (Par. 3, Petitioner's Exhibit F, R. 40 and 41) This basis was the actual economic cost to Petitioner of these vessels, represented by their original aggregate purchase price of $49,582,767.02 (adjusted downward by $2,433,723.60 to account for unrecognized gain on four vessels traded in at the time of original purchase), and had been approved by the Internal Revenue Service. Of the original purchase price, $6,449,107.02 was paid in cash; $2,609,600.00 was paid through a trade-in allowance on four vessels; and the

remaining sum of $40,524,060.00 was evidenced by a series of notes secured by 18 preferred ship mortgages, one per vessel. From the various dates of purchase of the vessels through March 7, 1946, Petitioner made cash payments in the aggregate of $9,786,339.19 in reduction of the mortgage indebtedness, leaving an aggregate mortgage indebtedness, as of March 8, 1946, of $30,737,720.81, for which Petitioner was obligated to pay.

As of March 8 1946, an adjustment in the purchase price of the vessels, by means of an adjustment in the remaining mortgage indebtedness pursuant to Section 9 of the Act, was made. The net economic effect on Petitioner of such adjustment in purchase price was simply and solely a reduction of $20,468,904.07 in the then remaining mortgage indebtedness[14] and in the amount that Petitioner had previously obligated itself to pay for the vessels. Petitioner's economic investment in, and consequently its cost basis of, the vessels was therefore reduced as of March 8, 1946, from $47,149,043.42 to $26,680,139.35.[15]

(b) Positions and contentions of the parties.

Petitioner contends that the Act, although having certain specific but limited provisions with regard to taxes, is not a tax statute; that the Act itself nowhere specifically fixes, nor can it be construed by a normal and reasonable

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[14] Par. 9, Petitioner's Exhibit F, R. 40 and 47-48; line 20, Sheet 6, Exhibit B to Exhibit S-3 to Petitioner's Exhibit F, R. 68. As of that date and pursuant to the provisions of the Final Agreement between Petitioner and Government, Petitioner made an additional cash payment to the Government of $86,037.70. This simply increased the amount of cash payments which Petitioner had made and reduced its mortgage indebtedness by an equivalent amount but had no effect on the economic investment of Petitioner in, and its tax cost of, the vessels. Par. 9, Petitioner's Exhibit F (R. 40 and 48)

[15] See computation VIII, Appendix E, *infra*, E-2.

construction of its provisions to fix, the tax cost basis of a vessel whose original purchase price is adjusted pursuant to Section 9 of the Act; and that, therefore, the tax cost basis of such a vessel is fixed and determined by the usual provisions and rules of the Internal Revenue Code.

Petitioner further contends that the usual provisions and rules of the Code require that the tax cost basis of property is its owner's economic cost of, or investment in, that property; and that, when the purchase price of property is later adjusted (either by a cash refund, a reduction in indebtedness for a portion of the purchase price, or a combination of the two), the owner's economic investment in that property is its original cost to him less the amount of the adjustment.

Therefore, Petitioner respectfully contends that under the normal applicable Code provisions its economic investment in the 18 vessels, and therefore its tax cost basis, is the original tax cost ($47,149,043.42) less the adjustment in its mortgage indebtedness ($20,468,904.07), or $26,680,139.35.[16]

The Government contends that the Act is a tax statute and by its very provisions, construed in the light of its legislative history, establishes the tax cost basis of a vessel whose original purchase price is adjusted pursuant to the Act and that the normal and usual Code provisions do not apply. According to the Government, Section 9 of the Act requires that the tax cost basis of such a vessel be its "statutory sales price" as defined and used in the Act, which is $17,997,981.84 for the 18 vessels owned by Petitioner.[17] This tax cost basis is $8,682,157.51 less than Petitioner's actual economic investment in these 18 vessels.

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[16] See computations IV, VI and VII, Appendix E, *infra*, E-1 and E-2.

[17] See computation IX, Appendix E, *infra*, E-2.

(c) The controlling Code sections and principles support Petitioner's contention that its true economic cost of the 18 vessels is their tax cost basis.

This issue arose by reason of the deduction which Petitioner claims its is entitled to take under the Code for depreciation on the 18 vessels purchased by it from the Government and whose purchase price was adjusted under Section 9 of the Act. Section 23 of the Code enumerates the deductions allowed from gross income to compute net income, and subsection (l) of that section provides for a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) of property used in the trade or business. Subsection (n) of the same section provides that "The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114." The latter section in turn provides in subsection (a) that "The basis upon which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 113(b) for the purpose of determining the gain upon the sale or other disposition of such property . . ." Section 113 of the Code provides in part as follows:

> "SECTION 113. Adjusted basis for determining gain or loss.
>
> "(a) Basis (unadjusted) of property. — The basis of property shall be the cost of such property; except that—
>
> * * * * * * *
>
> "(b) Adjusted basis.—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided."

Thus in general, for purposes of calculating depreciation, the basis of the property to be depreciated is the cost to its owner.[18] Cost is not defined in the statute nor in the regulations. However, the courts have held that the outlay of the owner for, or the latter's net investment in, the property is its cost basis to the owner. *Detroit Edison Co.* v. *Commissioner,* 319 U. S. 98, 63 Sup. Ct. 902, 87 L. Ed. 1286 (1943). This will be determined by the cash paid or the value of property given by the taxpayer plus the amount which the taxpayer obligates himself to pay for the property. *Crane* v. *Commissioner,* 331 U. S. 1, 67 Sup. Ct. 1047, 91 L. Ed. 1301 (1947). This conforms to the usual understanding and meaning of cost. As stated by Circuit Judge Cameron, dissenting in the Fifth Circuit (at p. 135), Webster's definition of cost is "The amount in value paid, charged or engaged to be paid for anything bought or taken in barter." In determining the cost basis of the property under this Section of the Code, subtleties should be ignored and actual economic cost of the property to the taxpayer should be determined by looking to the substance of the transaction, *Abraham I. Effron* v. *Commissioner,* 25 B. T. A. 853 (1932), and fictitious or artificially created costs, either by the taxpayer to avoid taxes or by the Government to increase taxes, are not controlling.[19]

Under subsection (a) of Section 113, there are 23 paragraphs enumerating exceptions to the basic rule. However, none of these exceptions remotely touches upon the problem at hand. Unless the transaction clearly falls within one of the specific exemptions requiring or permitting a basis other than original cost, the latter is to be the basis. Although

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[18] Treasury Reg. 111, Section 29.113(a)-2. Mertens, Law of Federal Income Taxation, Vol. 3A, Section 21.02, p. 13.

[19] 3A Mertens, *op. cit. supra,* note 18, at 15.

there are these numerous exceptions, they are not to be extended by implication.[20]

There is no dispute as to the applicable Code sections. Also, it is not disputed that Petitioner's basis for the 18 vessels prior to the adjustment in price was $47,149,043.42 and that Petitioner's mortgage indebtedness was reduced pursuant to Section 9 of the Act by $20,468,904.07. Under the recognized tax principles the subtraction of this reduction in mortgage indebtedness from the original basis will give Petitioner's net investment in or outlay for the property, and its new tax basis. As Judge Madden cogently and succinctly stated in *Socony* (at pp. 912-3):

> "It would seem that if one has bought property and paid $10,000 for it, and the seller later offers to readjust the price, according to a complicated formula, and when the computation is completed, the seller gives back to the buyer $3,117.24, the property has cost the buyer $6,882.76. That being, in fact, his cost, it would seem to be his basis for computing depreciation, if the property is depreciable for tax purposes."

Against this the Government attempts arbitrarily to fix the unadjusted tax basis of the 18 vessels at the "statutory sales price" of $17,997,981.84. This would result in a tax basis slightly in excess of the actual cash paid on the purchase price of the vessels as of March 8, 1946 (in the amount of $16,235,446.21), and would almost completely ignore the additional $10,182,779.04 which Petitioner was still obligated to pay. As the Court of Claims stated in *Socony* (at p. 913); "The Government does not deny that the plaintiff's depreciation should be based upon its cost. But it says that the plaintiff's 'cost' for this tax purpose

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[20] 330 F. 2d 128, 134 (1964); 3A Mertens, *op. cit. supra*, note 18, at 13 and Section 27.10; p. 27.

is not the difference between what it originally paid and what it got back in the section 9 readjustment. That means that the Government's asserted 'cost' is not the economic, dollars-and-cents cost, but an artificial figure, legally deemed, for this tax purpose, to be the cost though it is not in fact the cost.''

If the Government is to prevail, there must be some clear and compelling reason for arbitrarily fixing Petitioner's cost basis of the vessels at an amount less than its economic investment in the vessels. In the absence of such a reason, and it is respectfully submitted that no such reason exists, the normal Code provisions and tax principles will be followed, giving the tax basis contended by Petitioner:

2. Section 9 of the Act sets forth a complete and indivisible formula which must be applied in its entirety in determining the amount of adjustment to be made in the purchase price and, therefore, in the tax cost basis, of vessels purchased from Maritime prior to the effective date of the Act.

Sections 3 and 9 of the Act are the only ones that pertain to Petitioner and this issue. Section 3 contains, in the main, definitions that apply to Section 9. The provisions of Section 9 of the Act, entitled ''Adjustment for Prior Sales to Citizens,'' are clear and unambiguous and relate solely to price adjustment on prior sales. Subsection (a) provides that a citizen who owns a vessel which he purchased from the Commission between certain dates, or is a party to a contract with the Commission to purchase a vessel which has not been delivered to him, ''shall . . . be entitled to an *adjustment in the price of such vessel under this section* if he makes application therefor, . . .'' (Emphasis added).

Section 9(b) provides that "such adjustment shall be made as hereinafter provided, . . ." The term "such adjustment" has meaning only in reference to the "adjustment in the price of such vessel," as set out in the preceding subsection (a). Subsection (b) further provides that "the amount of such adjustment shall be determined as follows." Again, the term "such adjustment" can only mean the "adjustment in the price of such vessel." Thereafter, in subsection (b), follow eight numbered subparagraphs, all of which, according to the plain wording of the Act, are to be applied in determining the amount of such adjustment.[21]

Paragraphs (1) through (8) of Section 9(b) are part of a complicated formula, which consists of a number of adjustments and credits to the applicant and to Maritime, the net result of which, however, is *the* adjustment in original purchase price. In connection with Section 9 of the Act, it must be recalled that its sole purpose and function was to serve only in the case of a vessel *sold prior to the enactment of the Act*. The entire section is based on a fiction, that of "treating the vessel as if it were being sold to the applicant on the date of the enactment of this Act, and not before that time." (Section 9(b)). This recognizes that no *actual* sale took place at that time, but only that the adjustment provided by that section would be made under such fiction and as of that date.

Paragraph (1) is a credit to applicant for the excess of all cash payments made upon the original purchase price over 25% of the statutory sales price.[22] Paragraph (2)

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[21] See Appendix A, *infra*, A-6.

[22] Although the Act provides that if such payments are less than such 25%, "the Applicant *will pay* the difference to the Commission", Maritime has, in such cases, treated it as a credit to Commission. This was the situation in *National Bulk*; see 214 F. Supp. 585, 587. See computations III and XIV, Appendix E, *infra*, E-1 and E-5.

provides for an adjustment in Applicant's mortgage, the amount and manner of which is set out in Paragraph (3).[23] Paragraph (4) is a credit to Applicant of the excess of cash payments plus re-adjusted trade-in allowance (determined under Paragraph (7)) over statutory sales price, to the extent not allowed under Paragraph (1). Paragraph (5) credits applicant with interest at 3½% per annum from date of original delivery of vessel to Applicant on excess of original purchase price over any trade-in allowance, less a counter-adjustment. Paragraph (6) credits Commission with charter hire paid applicant for bareboat use of the vessel up to date of the Act and credits Applicant for charter hire that would have been paid for bareboat use of vessel exchanged on original purchase (from date of exchange to date of Act). Paragraph (7) limits the allowance for a vessel exchanged on original purchase to the amount provided in Section 8 of the Act. Paragraph (8) provides that there shall be subtracted from the sum of the credits in the favor of the Commission and Applicant, respectively, the overpayment of or deficiencies in Federal taxes resulting from the computations required under Section 9(c)(1). Then Paragraph (8) further provides that the resulting sums of credits of Commission and Applicant shall be netted for disposition.[24]

It can thus be seen that Paragraphs (1), (4), (5), (6) and (8) grant certain credits, and that Paragraphs (2), (3) and (7) make certain adjustments. The credits are required by Paragraph (8) to be netted together, the net result of which is commonly referred to as the "net cash credit" or "cash adjustment." (Par. 8(g), Petitioner's Exhibit F,

[23] See computation IV, Appendix E, *infra*, E-1.

[24] See computation V, Appendix E, *infra*, E-1.

R. 40 and 46-7) All agree that the credit against the mortgage indebtedness pursuant to Section 9(b)(3) constitutes part of the total amount of the adjustment in purchase price provided for in that Section. The controversy arises solely with respect to the effect to be given to those credits provided for in Section 9(b), which were netted together pursuant to Section 9(b)(8) in order to arrive at the "net cash credit." Petitioner contends that the "net cash credit" or "cash adjustment" determined pursuant to Section 9(b)(8) constitutes an integral part of the adjustment in purchase price computed by means of applying that part of the formula in Section 9(b) relating to credits measured by cash transactions and that the total amount of the adjustment in purchase price under Section 9 is determined by adding the amount of the reduction in mortgage indebtedness, under Section 9(b)(3), and the "net cash credit", under Section 9(b)(8).

However, the Government contends that the "net cash credit", as such, does not constitute a part of the adjustment in purchase under Section 9. To support this theory it divides Section 9(b) into two computations with differing purposes. Paragraphs (1) through (4) constitute one computation for the purpose of determining the adjustment in purchase price with the result that the adjusted purchase price, and therefore, the cost basis, is the statutory sales price. Paragraphs (5) through (8) constitute the second computation whose purpose is to "unwind" certain transactions between Applicant and Government occurring between the dates of original purchase and of the Act, the amounts of which are netted together pursuant to Paragraph (8) solely for convenience in determining and making payments.

There is nothing in the language nor in the structure of Section 9(b) to support such a theory.[25] In fact both language and structure absolutely refute such an interpretation. As previously indicated, Section 9(b) provides that "the amount of such adjustment shall be determined as follows", followed by the eight numbered paragraphs without more or without a break after Paragraph (4). Also Paragraph (8) in netting the credits provides that "there shall be subtracted from the sum of the credits in favor of the applicant *under the foregoing provisions of this subsection* . . .", meaning Paragraphs (1) through (8) (not just (5) through (8)) and including specifically the credits in Paragraphs (1) and (4).

The position which the Government now takes was not the position of Maritime, the agency charged with the responsibility for implementing the Act. On April 23, 1946, Maritime issued regulations pursuant to the Act.[26] Section 299.51[27] of these Regulations was entitled "Adjustment for Prior Sales to Citizens." The Regulations, in so far as Section 9 is concerned, in general, follow closely the form and wording of the statute itself. Subsection (d) of Section 299.51, entitled "Amount of Adjustment", recognized the fiction under which the adjustment under Section 9(b) would be made, and the purpose being served by the computations required by that fiction and made in the numbered

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[25] A fact which was recognized by the Delaware Court (at p. 590): ". . . While the legislature has not interlined any distinguishing language between those sections that bring the contract price down to the statutory sales price and the other sections, a close reading *suggests* that the legislature *may* have had *some* distinction in mind . . ." (Emphasis added).

[26] 11 Fed. Reg. 4459, Ch. II, Sub-chapter E, 46 C. F. R., Part 299. These were revised by Gen. Order 60, 22 F. R. 11103, Dec. 31, 1957, codified in the same portion of the Code of Federal Regulations.

[27] Now Section 299.66, 46 C. F. R. Appendix A. *infra*, A-13.

paragraphs under Section 9(b). In each of the numbered paragraphs under 299.51(d) it was carefully pointed out that the credit was being made "for the purposes of subparagraph (8) of this paragraph (d)".[28] Subparagraph (f) of Section 299.51, entitled "Method of Adjustment," makes more specific the adjustment to which Section 9(b) of the Act refers and reads as follows:

> "If the Administration finds that the applicant is entitled to an adjustment, applicant will be notified of the *adjusted purchase price* determined by the Administration. Unless the applicant notifies the Administration to the contrary within 15 days following the date of receipt by the applicant of the Administration's determination of *adjusted purchase price, this adjusted purchase price* will be binding upon applicant and it agrees to execute an *addendum to its original contract to purchase,* which addendum will be sent to him by the Administration." (Emphasis added.)

The form of application for such adjustment was set out in Section 299.87[29] of those Regulations and was entitled "Application for Adjustment of Purchase Price." The method of adjustment, as set out in subparagraph (f) of the Regulation, was also set out as Section F of the Application.

On May 31, 1946, Petitioner filed an application under Section 9 of the Act for an adjustment in price under the Act of the 18 vessels owned and purchased by it from the Government. On December 30, 1946, Petitioner and the Government (acting through Maritime) entered into an "Interim Agreement" for adjustment of price sales of

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[28] This wording is contained in each of the paragraphs providing for computations of credits. See Appendix A, *infra*, A-15 through A-17.

[29] Now Section 299.133, 46 C. F. R. See Appendix A, *infra*, A-19.

vessels to citizens, pursuant to Section 9 of the Act, Contract No. MCc-42281.[30] At the conclusion of ARTICLE XII of the Interim Agreement, it was agreed that the net credit to the Applicant on account of such interim adjustment "shall be credited by the Commission on the adjusted mortgage indebtedness of the Applicant and applied on the unpaid installments thereof with respect to such vessels as may be designated by the Applicant." ARTICLE XVIII of Interim Agreement provided as follows: "Applicant and the Commission further agree that when final adjustment and settlement of this Agreement is made as herein provided for, such adjustment and settlement shall constitute and become full, final and complete discharge of the respective liabilities of the parties one to the other, (1) under the terms of the contracts by virtue of which Applicant required from the Commission title to the war-built vessels herein named and (2) pursuant to the provisions of the Act."

On January 3, 1951, the Chief of the Division of Claims of Maritime wrote to Petitioner and submitted revised schedules, reflecting "the final adjustment with respect to each of the eighteen vessels involved, before taking into account any overpayment or deficiency in federal taxes resulting from application of Section 9(c)(1) of the Act, to be furnished by the Bureau of Internal Revenue." On Sheet 6 of Schedule II, enclosed with that letter, item 18 is as follows; "18. Total net credit to owner before tax adjustment . . . $20,038,698.41",[31] which is the sum of the adjustment in mortgage indebtedness under Paragraph (3) and the net cash credit to Petitioner under Paragraph (8).

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[30] Exhibit S-1 to Petitioner's Exhibit F, Par. 5, R. 42; Appendix D, *infra*, D-1. See note 6, *supra*.

[31] Par. 6, Petitioner's Exhibit F, R. 43; Exhibit S-2 to Petitioner's Exhibit F, Appendix D, *infra*, D-18. See note 8, *supra*.

On June 11, 1951, the "Final Agreement for Adjustment for Prior Sales Pursuant to Section 9 of the Merchant Ships Sales Act of 1946", Addendum No. 1 to Contract No. MCc-42281, between Petitioner and the Government (acting through Maritime), was made and entered into.[32] ARTICLE 1 identified each of the war-built vessels and the construction contract and purchase contract applicable to it (R. 52); ARTICLE 2 pertained to credits in favor of Applicant (R. 53); ARTICLE 3 pertained to credits in favor of the Government (R. 55); ARTICLE 4 pertained to net cash credits and stated that "The net amount of the final cash adjustment in favor of the Applicant under Section 9 of the Act is $2,917,112.19, . . ." (R. 56); ARTICLE 5 pertained to the mortgage adjustment and disposition of Applicant's net cash credits (R. 56-7); and ARTICLE 7 contained a provision similar to ARTICLE XVIII of the Interim Agreement, pertaining to the finality of the settlement (R. 59).

Thus in its Regulations and in its various agreements with Petitioner Maritime treated the formula in Section 9(b) as unitary by netting the various credits and did not divide the computations into an adjustment in purchase price and into certain cash credits for purposes of payment only. Under these circumstances, although Petitioner maintains the statutory language is clear and unambiguous, the holding in *Federal Housing Administration* v. *The Darlington*, 358 U. S. 84, 90, 79 Sup. Ct. 141, 3 L. Ed. 2d 132 (1958) is appropriate:

> "* * * The contemporaneous construction of the Act by the agency entrusted with its administration is squarely to the contrary. In circumstances no more ambiguous than the present we have allowed

[32] R. 51, Exhibit S-3 to Petitioner's Exhibit F.

contemporaneous administrative construction to carry the day against doubts that might exist from a reading of the bare words of a statute. * * *".

It is also pertinent that the issue as to the basis of the vessels has been raised by the Internal Revenue Service, an agency which had nothing to do with the basic administration of the Act, a fact which it has recognized.[33]

However, the Government attempts to bolster its argument by contending that the charter hire which Petitioner received on the vessels and for which a credit was given to the Commission under Paragraph (6) of the formula contained in Section 9(b) is a non-capital item and therefore cannot be counted in determining basis. It is basic tax law that monies received for the sale of property do not change their character merely because of the fact that the purchase price is predicated upon other facts, such as gross income or net income from the property. See *Commissioner* v. *Hopkinson*, 126 F. 2d 406 (2nd Cir., 1942); *Massey* v. *U. S.* 226 F. 2d 724 (7th Cir., 1955); *Edward C. Myers*, 6 T. C. 258 (1946).[34] Also it must be recalled that Section 9(b) is a

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[33] "The determination of the applicability of the Act to a specific vessel, *the amount of the adjustment*, and the responsibility for entering into an agreement with the applicant as to the application of Section 9(c)(1) of the Act are matters within the jurisdiction of the Commission. The act confers no authority to function in these matters upon the Bureau of Internal Revenue." Mimeograph 6366, 1949-1 Cum. Bull. 270. (Emphasis added.)

[34] Suppose as an example a sale of income producing property such as a vessel either for a contingent price or with a "most-favored-customer" clause (that is, that if a similar vessel is subsequently sold by the seller for a lesser price, the earlier purchaser will get the benefit of the reduced price), the formula for final determination in each to be similar. The original purchase price is to be adjusted based upon interim events such as earnings (or losses), expenses incurred in production of income (normal as well as taxes on the property or on the earnings), and similar factors. Would anyone contend that the adjusted purchase price, in either event, would not be the original price less the adjustment, although such factors as earnings, net or gross, expenses, losses and taxes were a measure of the adjustment?

fiction or hypothesis used solely for the purpose of making certain determinations leading to a price adjustment. Included in the complicated formula are factors which are *measured* by certain hypothetical events, none of which actually or legally took place. The fact that the purchase price of property is determined by reference to or measured by other factors does not change the amount or the status of the purchase price.

Thus a careful reading of the Act, the regulations of Maritime and the Contract between the Government and Petitioner implementing it leads to no doubt of its meaning, its application and its effect. There is nothing in the Act to support the Government's theories (1) that the formula contained in Section 9(b) is really two formulas with differing computations, purposes and results and (2) that the one net total adjustment in purchase price under that Section was not the sum of the initial adjustment in mortgage indebtedness under Paragraph (3) and the net cash credit to Applicant under Paragraph (8). Also there is nothing in the Act that would change, or exempt the transaction from, the usual Code provisions for determining the basis of property for depreciation purposes.

3. The Delaware District Court and the Court of Appeals for the Fifth Circuit erroneously interpreted the clear language of Section 9.

As indicated before, the Act is not a tax statute. Its principal purpose is the disposal of merchant ships. However, as in the case of many statutes whose principal purpose is other than tax, it has tax effects. The point at issue

is whether these tax effects are provided for specially in the Act or are left to the usual Code provisions or rules. There is no dispute between the parties as to the meaning and effect of Section 9 of the Act as to its principal purpose, the adjustment in purchase price of Petitioner's 18 vessels. This was agreed upon and consummated by written contract and the facts stipulated by the parties.

What does the Act provide, if any, as to the tax effects of Section 9? It contains only two sections with any reference whatsoever to taxes. These are subsections (c)(1) and (b)(8) of Section 9 of the Act; but neither says anything whatsoever with regard to the basis for tax purposes of a vessel whose price is adjusted under that section. Thus, there is no statutory rule or provision set out in the Act which would change the normal application and effect of Section 113 of the Code.

How did the lower courts then determine otherwise? The Delaware Court commences by asserting that "Section 9 is sufficiently unclear to justify resort to legislative history" (At p. 590). Then it cites four factors in the statute itself to support the Government's argument.[35] First it quotes that portion of Section 9(b) which states that "Such adjustment shall be made . . . by treating the vessel as if it were being sold to the applicant on the date of the enactment of this Act, . . . and not before that time." We have already recognized that Section 9 operates under a statutory fiction. However, it is quite apparent that this fiction

[35] That Court, however, by concluding that "The presence of logical arguments supporting two interpretations of the same language compel the conclusion that the statute is ambiguous" (at p. 591), at least concedes that the statutory language also logically supports Petitioner's position.

is to apply *only* to obtain the adjustment in price and not for *all* purposes.

Then the Delaware Court quite erroneously and with no justification from the form or wording of the statute attempts to divide paragraphs (1) through (8) of Section 9(b) into two separate or different modes of adjustment, contemplating two severable transactions (p. 590). However, it is interesting to note that the Court, in its outline of the facts leading to the net credit to the Government (pp. 587-8), did not treat those paragraphs as providing two different modes of adjustment. Instead each of the paragraphs providing for a credit to the applicant or to the Commission was given effect by the Court (p. 588). However, in its subsequent analysis of these paragraphs (at p. 590), that Court attempted to distinguish between the credits and adjustments in the first three[36] paragraphs and those in the last four paragraphs of that section. In so doing, the Court inexplicably but erroneously ignored the clear wording of the initial paragraph of Section 9(b) that "*Such adjustment* shall be made *as hereinafter provided*, . . . The amount of *such adjustment* shall be determined *as follows:*" followed by eight numbered paragraphs. The Court attempts to bolster this position by stating that Plaintiff admits that, if the statute stopped after the first three paragraphs, the adjusted purchase price would be the statutory sales price.[37] However, this admission simply recognizes the plain and literal reading of this isolated seg-

[36] Actually first four paragraphs, although Paragraph (4) did not apply in that case.

[37] See p. 587, note 4, and p. 590.

ment of the statute[38] followed by the application of the usual Code rules thereto.[39]

However, the District Court then goes on to support its bifurcation of Section 9(b) by pointing out how the statu-

[38] Note the difference between Section 9(c) of the Senate amendment of H. R. 3603, Appendix C, *infra*, p. C-3, which provides that "The amount of the adjustment under this section *shall be* the excess of (1) the purchase price of such vessel . . . over (2) the statutory sales price of the vessel . . . and Section 9(b) of the Act, as adopted, which provides that "The amount of such adjustment *shall be determined*, as follows: . . . Although the statute is quite awkwardly worded, one can determine the adjusted purchase price without having such price actually set out in so many figures. Nowhere in the Interim or Final Contract between Petitioner and the Government is the adjusted purchase price set out. However, if two persons enter into a contract for the purchase and sale of property, which contract provides for the amount of the cash payment and the amount for which purchaser is obligated to pay in the future, as evidenced by a note and secured by a mortgage, no one would deny that the sum of those two amounts would be the purchase price, even though such sum was not, in fact and as such, set out in the contract. This is the situation at hand. The original purchase price and the cash payments made thereon through March 7, 1946, have been stipulated by the parties. Therefore, in arriving at the adjusted purchase price where the original cash payments and the balance of the mortgaged indebtedness prior to the application of Section 9 are known, any refund of, or payment in addition to, the payments already made, and any adjustment in the remaining mortgage indebtedness would enable any one by simple addition and subtraction to ascertain the adjusted purchase price.

[39] Had Section 9(b) stopped after paragraph (3), Petitioner would have been credited with $11,735,950.74 under paragraph (1), which applied against the total cash paid as down payment and in reduction of mortgage indebtedness through March 7, 1946, of $16,235,466.21, would have left Petitioner with a cash investment in the vessels of $4,449,495.47 (R. 44); and if Petitioner's remaining mortgage indebtedness, as of March 7, 1946 had been adjusted under paragraph (2) and (3) to $13,185,928.93 (R. 45), the sum of the adjusted mortgage indebtedness plus the cash paid would have been $17,997,981.84, the statutory sales price. (R. 49) See computation X, Appendix E, *infra*, E-3. This would have been Petitioner's investment in, and therefore the cost basis of, the vessels. This would follow, however, not from any provision in the Act fixing statutory sales price as the basis for Section 113 purposes but by reason of the usual rules under Section 113.

tory language in paragraphs (5) and (6) differs from that in paragraph (3).[40] The Court then follows the Government's argument and looks only to the respective credits called for under paragraphs (5) through (8), ignoring entirely the fact that paragraph (1) also calls for the making of a credit.[41] The Court then concludes (p. 590): "... These sections look to the immediate exchange of cash after all the credits and debits have been added; Congress has so provided. The *two different modes of adjustment* suggest that Congress contemplated *two severable transactions*" (emphasis added). However, if the credit required under paragraph (1) is included with the credits required under paragraphs (5) through (8), as so clearly required by the statute,[42] the results reached by the Court, and argued for by the Government, do not follow. If all of the paragraphs of Section 9(b) are applied, as plainly and literally required by the Act, in the same manner as paragraphs (1) through (3) were applied above to arrive at an adjusted purchase price equal to the statutory sales price (on the assumption the adjustment stopped there), a net cash credit is due Petitioner of $2,917,112.19. This is so found and so provided in ARTICLE 4 of the Final Agreement between Petitioner and the Government. (R. 56) If this

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[40] The former two start out "the Commission [or the applicant] shall credit the applicant [or the Commission] . . ."; whereas, paragraph (3) provides that "The adjusted mortgage indebtedness shall be in an amount equal to . . ." See appendix A, *infra*, A-6 and A-7.

[41] "(1) The Commission shall *credit* the applicant with the excess of the cash payments made upon the original purchase price of the vessel over 25 per centum of the statutory sales price of the vessel . . ."

[42] Paragraph (8) clearly states "There shall be subtracted from the sum of the credits in favor of the commissions *under the foregoing provisions of this subsection* . . . and there shall be subtracted from the sum of the credits in favor of the applicant *under the foregoing provisions of this subsection* . . ." (emphasis supplied).

had been paid in cash, as paragraph (8) provides, and as the Delaware Court recognized,[43] Petitioner would have received back this sum and therefore its investment in, and the cost basis of, the 18 vessels would have been $26,680,139.15, the amount contended for by Petitioner.[44]

Then the Delaware Court stated (p. 590): "If the legislature intended that all the adjustments be considered part of cost, it would have been logical to provide that all adjustments be applied first to the mortgage indebtedness."[45] However, it makes no difference whether the credit had been paid to the Petitioner, in which case, it would have reduced his payments in cash or had been applied against the mortgage indebtedness, thereby reducing his obligation to pay for the property purchased. In either case, so far as determining the cost of the property to the taxpayer and its tax basis, the result would have been the same. However, in the Interim Agreement entered into by the Petitioner and the Government on December 30, 1946, it was agreed (ARTICLE XII) that the net credit to Petitioner "shall be credited by the Commission on the adjusted mortgage indebtedness of the Applicant and applied on the unpaid installments thereof with respect to such vessels as may be designated by the Applicant." This Agreement was carried out by ARTICLE 5 ("Mortgage Adjustment and Disposition of Applicant's Net Cash Credits") in the Final Agreement (R. 56)[46].

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[43] "These sections look to the immediate exchange of cash after all the credits and debits have been added". (p. 590)

[44] See computation XI, Appendix E, *infra*, E-3.

[45] Citing note 17 in which it stated: "It should be noted that the Commission, in this case, actually applied all the adjustments against the mortgage. This is conceded to be erroneous and contrary to the statute."

[46] However, the Delaware Court was quite in error in its observation in note 17 because the action which the Court termed as

The Delaware Court also said that the provision of Section 9(c)(2) limiting the Government's liability for the loss of a vessel adjusted under Section 9 and chartered to the Government, to the statutory sales price depreciated to the date of loss, supports the Government's theory, concluding that (p. 591); ". . . If the new price is not the statutory sales price, this provision is without meaning . . .". This is not so, however. In the absence of this provision, the liability of the Government would have been set by the

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"erroneous and contrary to the statute" was required by the Independent Offices Appropriation Act, 1948, 61 Stat. 585, 604, which provided as follows:

> "Whenever, in connection with any transaction involving the sale, purchase, or requisition of any vessel, the United States shall be or become obligated to pay any sum to the other party to the transaction and said other party shall be or is indebted to the United States on account of any transaction involving the sale, purchase, or requisition of any vessel, the amount so owing to the United States shall be deducted from the amount due the other party, and no officer or employee of the Government shall pay to such other party a sum greater than the net amount owing the other party."

This provision is written in terms purporting to be of general application. However, its legislative history shows unequivocably (1) that Congress was of the opinion that the "net cash credit" or "cash adjustment" computed pursuant to Section 9(b)(8) of the Act was for the purpose of determining a part of the refund or rebate in purchase price granted under Section 9 of the Act, and (2) that the specific and primary purpose of the provision was to amend or repeal that part of Section 9(b)(8) which required such part of the refund or rebate in purchase price to be "paid" to the Applicant and to require that it be applied in reduction of any existing mortgage indebtedness on the vessel, as of March 8, 1946. See Hearings on the Independent Offices Appropriation Bill for 1948 before the Subcommittee of the Committee on Appropriations, House of Representatives, 80th Cong., 1st Sess.; H. Rept. No. 589, 80th Cong., 1st Sess., dated June 13, 1947, reporting on the Independent Offices Appropriation Bill, 1948, at p. 31; and *National Bulk Carriers* v. *Warren*, 82 F. Supp. 511, 513 (D. D. C. 1949).

terms of the charter,[47] or by the normal rules under Section 902 of the Merchant Marine Act, 1936,[48] either or both of which may have differed from the statutory sales price (or for that matter from the original purchase price adjusted under Section 9).

Finally the Delaware Court cites (at p. 591) the heading of the statutory section "adjustment for prior sales to citizens" as against the heading in the U. S. Code "price adjustment" in support of its holding for the Government. Even without a heading, however, it is clear that the adjustment can mean only a price adjustment. This would not be a reason to support the Government's position but might follow if, in fact, the Section pertained by language or form to an adjustment other than price.

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[47] See Clause J, amending the First paragraph of Option II of Clause C, Part I, of the charter on the Hastings, Exhibit 59 and also Exhibit 30, both to Plaintiff's Exhibit G. (R. 150, 152, 154-5 and 159-60)

[48] 49 Stat. 2015, c. 858; 46 U. S. C. 1242 (1952 ed.); subsection (a) of which provides in part; "Whenever the President shall proclaim that the security of the national defense makes it advisable or during any national emergency declared by proclamation of the President, it shall be lawful for the Secretary of Commerce to requisition or purchase any vessel or other watercraft owned by citizens of the United States, or under construction within the United States, or for any period during such emergency, to requisition or charter the use of any such property . . . When any such property or the use thereof is so requisitioned, the owner thereof shall be paid just compensation for the property taken or for use of such property, but in no case shall the value of the property taken or used be deemed enhanced by the causes necessitating the taking or use. * * *"

Subsection (b) pertains to the value of a vessel so requisitioned for use or purchased when it was originally acquired under a construction differential subsidy (with which none of Petitioner's 18 vessels were constructed) and provides in part; "When any vessel is taken or used under authority of this section, upon which vessel a construction-differential subsidy has been allowed and paid, the value of the vessel at the time of its taking shall be determined as provided in section 1212 of this title, * * *" (referring to Section 802 of that statute).

The Third Circuit recognized "that the statute does not specifically state which figure is to be used for applicant's cost basis for depreciation purposes" (p. 410). It cites nothing to show any doubt or ambiguity in the statute but, relying solely on the argument to the contrary of the Government, proceeds to examine the statutory scheme together with the legislative history of the Act. However, it does not even bother to analyze the statute but looks solely to its legislative history. Since it found nothing in the statute either to specifically fix the basis of a vessel for depreciation purposes or to prescribe rules for determining such basis other than the usual ones under the Code, the latter should and do apply.

The majority opinion of the Fifth Circuit gives only a cursory treatment to the language of the Act and even this is coupled with the legislative history of the Act and is stated more in the form of conclusions than analyses. At most it is a brief synopsis of the Government's argument and relies entirely on the opinion of the Delaware Court. Contrast this with the thoughtful and comprehensive analysis of Circuit Judge Cameron, dissenting (p. 133), and with that of the Court of Claims in the *Socony* case and of the Alabama Court in the instant case. After carefully setting out the statutory provisions of Section 9(b) and the computations thereunder, the Court of Claims concluded as follows (p. 913):

> "Congress could, of course, have provided that a former purchaser of ships who desired to take advantage of the readjustment of price offered him by section 9 should, as a condition of the readjustment, obligate himself to compute future depreciation on a basis other than actual cost. Congress could have done this expressly, or by writing a text from which such an implication would necessarily result. Con-

gress has not done so expressly, and we do not find that it has shown an intent to do so."

The Alabama Court stated the question at issue and its conclusions as follows (pp. 929-30):

"The defendant sets forth several different methods of adjusting the figures to arrive at its alleged basis. But permeating this issue is a single inquiry: For purposes of computing depreciation under Section 113 of the Internal Revenue Code, are the proper bases the statutory sales prices, as defined in Section 3(d), or the actual economic investment and cost after making the adjustment pursuant to Section 9(b)?

". . . Section 9 of the Act is not a tax statute and it does not purport to provide the tax bases of vessels whose purchase prices have been adjusted thereunder. The tax bases of the eighteen vessels must be determined under the Internal Revenue Code. Sections 23(n) and 114(a) thereof provide for the allowance of depreciation computed on the basis of the property as determined under Section 113. Section 113(a) sets forth the general rule applicable to the present case as follows: 'The basis of property shall be the cost of such property * * *'.

"I agree with plaintiff that the cost basis in the instant case can best be determined by comparing the economic cost of the vessels to the plaintiff the moment before and the moment after the Act became effective. The parties have stipulated that plaintiff's economic investment in the vessels as of March 7, 1946, was $47,149,043.42. The parties also stipulated that as a result of section 9 adjustments the original mortgage indebtedness was reduced $20,468,904.07. This latter sum, plus a cash payment of $86,037.70 as of March 8, 1946, left an outstanding mortgage indebtedness of $10,182,779.04 on March 8, 1946.

"The court finds the plaintiff's economic investment in these vessels, and consequently its cost basis of the vessels as of March 8, 1946, to be $26,680,139.35 . . ."[49]

4. Lower Courts erroneously referred to legislative history of Section 9 of Act.

Not a one of the lower courts, either on original trial or on appeal, have pointed to any word or phrase or part of Section 9 as having or leading to a doubtful or ambiguous meaning. They have recognized that there is no specific provision in Section 9 of the Act fixing the basis of a vessel, whose original purchase price is adjusted, for purposes of depreciation and have pointed to no provision providing, or from which it may be inferred, that such basis shall not be determined under the usual Code provisions and rules. Under such circumstances, these Courts were in error in going beyond the clear wording and provisions of the Act on the grounds that the intent of Congress was not clear or that the statute was possibly ambiguous (not by its wording but simply because the Government argued for an interpretation without support in the language and form of the Act).

The usual rule has been stated that "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." *Caminetti* v. *United States,* 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442 (1916). Chief Justice Vinson, speaking for this Court in *Ex parte Collette,* 337 U. S. 55, 61, 69 Sup. Ct. 944, 93 L. Ed. 1207 (1949), put the matter, in a similar situation, as succinctly and emphatically as pos-

[49] See also *Barber Oil* at pp. 459-60.

sible: "Petitioner's chief argument proceeds not from one side or the other of the literal boundaries of Section 1404(a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 260, 89 L. Ed. 921, 933, 65 Sup. Ct. 605 (1945). This canon of construction has received consistent adherence in our decisions." (with note, citing cases).[50]

In *Commissioner* v. *Korell*, 339 U. S. 619, 70 Sup. Ct. 905, 94 L. Ed. 1108 (1950), this Court, recognizing that Congress could have provided for a more narrow definition of the term "premium" in the statute there being construed so as to disallow an amortization deduction and thereby increase the tax, concluded (pp. 615-6):

> "But we cannot reject the clear and precise avenue of expression actually adopted by the Congress because in a particular case we may know, if the bonds are disposed of prior to our decision, that the public revenues would be maximized by adopting another statutory path . . . it cannot be argued that Congress lacked the legislative discretion to have reached such a conclusion."

When Congress passed amendatory legislation to meet this decision, this Court was shortly faced with the construction of the amendment and particularly which call

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[50] In general, see Sutherland, Statutes and Statutory Construction (3rd Ed. by Horach), Vol. 2, Sections 4502-3 and 4706.

price applied. This Court, in holding for taxpayer in *Hanover Bank v. Commissioner*, 369 U. S. 672, 82 Sup. Ct. 1080, 8 L. Ed. 2d 187 (1962), concluded (p. 687):

> "A firmly established principle of statutory interpretation is that 'the words of statutes—including revenue acts—should be interpreted where possible in their ordinary everyday senses.' Crane *v.* Commissioner, 331 U. S. 1, 6. The statute in issue here, in plain and ordinary language, evidences a clear congressional intent to allow amortization with reference to any call date named in the indenture. Under such circumstances we are not at liberty, notwithstanding the apparent tax-saving windfall bestowed upon taxpayers, to add to or alter the words employed to effect a purpose which does not appear on the face of the statute . . ."

Since the statutory language here is clear, the applicable statutory rule of construction is, therefore, well established by the foregoing decisions. The statute should be given its plain meaning.

5. The Lower Courts erroneously interpreted the legislative history of Section 9.

Although contending that the statute is clear and unambiguous in its provisions and organization, making unnecessary any resort to extrinsic aids for the purpose of interpretation of its meaning, intent and effect, Petitioner recognizes that the American rule, unlike the English rule, allows the examination of the legislative history of a statute for purposes of construction and interpretation. However, where the meaning of the statute on its face or by its terms is clear, then such search should not be for

the purpose of raising doubts where none existed,[51] or if such doubts are raised by such search, then the meaning should be the otherwise undoubtful meaning of the statute.[52]

(a) The legislative materials considered by the lower courts either were not relevant or did not support Government's contention.

Since the statute itself is clear, the position of the Government, and of the lower courts cannot be sustained if a study of the legislative environment[53] either (1) fails to

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[51] *Railroad Commission of Wisconsin* v. *Chicago B & Q Railroad Co.*, 257 U. S. 563, 589, 42 Sup. Ct. 232, 66 L. Ed. 371 (1922). ("... Committee reports and explanatory statements of members in charge, made in presenting a bill for passage, have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. (citing case) But when, taking the Act as a whole, the effect of the language used is clear to the Court, extraneous aid like this cannot control the interpretation. (citing cases) Such aids are only admissible to solve doubt, and not to create it. For the reasons given, we have no doubt in this case.")

[52] *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U. S. 437, 441, 75 Sup. Ct. 489, 99 L. Ed. 510 (1955). ("This examination would conclude the construction of the section by English Courts, that is, by any court reading legislation as it is written without drawing on parliamentary debates. And considering that the construction that we have found seems plain, the so-called 'plain meaning rule' on which construction is from time to time rested also in this Court, likewise makes further inquiry needless and indeed improper. But that rule has not dominated our decisions. The contrary doctrine has prevailed. (citing cases) And so we proceed to an examination of the legislative history to see whether that raises such doubts that the search for meaning should not be limited to the statute itself.")

[53] *Sims* v. *United States*, 359 U. S. 108, 112, 79 Sup. Ct. 641, 3 L. Ed. 2d 667 (1959). "Intent" of Congress with regard to any law passed by it is at best nebulous, when one considers the number of members in each house, the various reasons, expressed or unexpressed, why each member constituting a majority supports the bill and numerous other contingent and unknown factors. How-

show the specific intent or meaning contended for by the Government or (2) shows no intent or meaning. A mere raising of doubt as to the intent will call for the return to the meaning as indicated on the face of the statute. The meaning or intent for which this search is made relates to the tax cost basis of a vessel whose original purchase price is adjusted pursuant to Section 9 of the Act.

The Act had its genesis as early as the 78th Congress, Second Session (1944) when H. R. 4486 was introduced and hearings on that bill were held before the Committee of the Merchant Marine and Fisheries of the House of

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ever, where the statute is quite complex and controversial, the task of ascertaining Congressional "intent" as to each provision is most difficult, if not impossible. The Act is just such a complex statute and was under consideration in two different Congresses over a period of two years.

"The bill is one of the most difficult bills that I have had anything to do with in my 27 years of service in this House. It far exceeds the 1936 Act, which was considered by the Committee on Merchant Marine and Fisheries while I was serving as chairman. These are more complications; less unanimity among interests that ought to be united in presenting a bill. More questions have arisen than in any other bill we have considered. Its preparation has taken much more time that I could have desired and believed was possible, because we have gone over the bill many times, considered many points, and tried to reconcile as nearly as we could, the various opposing interests. I doubt very seriously that any member of the committee would endorse every provision of the bill. It is a result of compromise . . ." (Chairman Bland, Committee on Merchant Marine and Fisheries, 97 Cong. Rec., Part 7, p. 9162).

"Mr. Chairman, this has been a very involved, controversial and complicated piece of legislation to work out . . ." (Mr. Bradley, *op. cit. supra;* p. 9164).

"Mr. Chairman, this bill H. R. 3603, is perhaps the most complicated and technical measure which has been before this body in more than a year . . ." (Mr. Burk, *op. cit. supra,* p. 9192).

"Mr. Chairman, at the outset the House should know the long and tedious work the Merchant Marine Committee has given the four different bills that have been presented to it dealing with this subject . . ." (Mr. Bonner, *op. cit. supra,* p. 9193).

Representatives.[54] Under this bill, Petitioner would have received an adjustment in its sales price sufficient to reduce that price to an amount equal to the statutory sales price. Thus its economic investment in, and cost basis of, these vessels for tax purposes would have been an amount which also was equal to the statutory sales price.[55]

As a result of these hearings, another bill, H. R. 5213, was introduced in that session of the Congress. This was referred to the same House Committee, but was not reported out. Subsection (e) of Section 1 of that bill was similar to the same section of H. R. 4486.[56] However, a substitute text was proposed by the Committee and printed on November 16, 1944.[57] Again Section 5 of the substitute bill, headed "Adjustment of Prior Sales", the same adjustment in purchase price would have been made to the vessels of Petitioner with the same result, i.e., the cost basis to Petitioner after receipt of the adjustment would have been an amount which was equal to the statutory sales price.

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[54] See H. Rep. No. 831, 79th Cong., 1st Sess., to accompany H. R. 3603, dated June 28, 1945, House Committee on the Merchant Marine, 1945 U. S. Code and Cong. Ser., p. 1086. See H. R. 4486, Appendix B, *infra*, B-1.

[55] See Section 1(e) of H. R. 4486, Appendix B, *infra*, B-3. Although the means and manner of such adjustment were not set out, either (1) the mortgage indebtedness would have been reduced to the difference between the cash payments theretofore made and the statutory sales price, or, in Petitioner's case, $1,762,535.63 (adjusted for the adjusted value of 4 vessels traded) or (2) the mortgage indebtedness would have been reduced to 75% of statutory sales price ($13,498,486.37) and a cash refund would have been made to Petitioner in the amount of $11,735,950.74 (plus adjusted value of 4 vessels). See computation XII, Appendix E, *infra*, E-3.

[56] See Appendix B, *infra*, B-5 and B-8.

[57] See Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 79th Cong., 1st Sess., on H. R. 1425, Part 1, p. 463. Appendix B, *infra*, B-12 and B-18.

No action was taken on the bills introduced in 1944 and in the 79th Congress, 1st Session (1945) H. R. 1425 was introduced, referred to the Committee on Merchant Marine and Fisheries of the House and hearings thereon were held by that Committee.[58] Section 5 of that Bill, entitled "Adjustment for Prior Sales" was the same as section 5 of the Substitute H. R. 5213 proposed at the previous Congress.[59] For the first time, a bill, S. 292, was introduced in the Senate. This was referred to a Subcommittee of the Committee on Commerce and hearings were held before that Subcommittee.[60] Section 5 of S. 292 was the same as Section 5 of H. R. 1425.[61] Up to this point in the legislature history of the Act, the present problem could not have arisen inasmuch as economic investment after a price adjustment would be an amount always equal to statutory sales price.

At the conclusion of 10 days of hearing on H. R. 1425 before the House Committee, the bill was then considered in executive session over a period of more than six weeks. As a result of this consideration and the decisions made therein, the Committee requested that a new bill be introduced embodying the decisions and views of the Committee. This new bill, H. R. 3603, was introduced and reported favorably by the Committee to the House.[62] Section 9 of that bill was entitled "Adjustment in Sales Price of Vessels

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[58] See Hearings Before the Committee on the Merchant Marine and Fisheries, House of Representatives, 79th Cong., 1st Sess., on H. R. 1425.

[59] Appendix B, *infra*, B-23 and B-29.

[60] See Hearings before a Subcommittee of the Committee on Commerce, United States Senate, 79th Cong., 1st Sess., on S. 292.

[61] Appendix B, *infra*, B-29, B-35 and B-41.

[62] See H. Rept. No. 831, 79th Cong., 1st Sess., to accompany H. R. 3603, dated June 28, 1945. See Appendix B, *infra*, B-47.

Sold Prior to Enactment of the Bill," and contained for the first time a price adjustment formula embodying the fiction of treating the prior sale as if the *bill* had been in effect at the time of the *sale*.[63]

At the time the House considered this bill in October, 1945, an amendment to Section 9 of the bill was proposed on the floor of the House, as the recommendation of a Subcommittee of the House Committee which had reported the bill out. This amended Section 9 was part of the bill adopted on October 2, 1945 and drastically changed the content and approach of Section 9 as contained in original H. R. 3603.[64] (Original 3603 was the bill referred to and

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[63] Appendix B, *infra*, B

[64] See 91 Cong. Rec. 9158-9202 (Part 7), particularly at pp. 9201-2 and 9269-9289, particularly at p. 9281; also Appendix B, *infra*, B

"At a session of the Committee only last Friday morning, however, two far-reaching amendments were adopted by the Committee which should be defeated. These amendments *rewrite and completely change* Sections 9 and 12.

"The circumstances under which the Committee adopted these two amendments are interesting and remarkable. Twenty-one members comprise the Committee. The Committee amendment to Section 9 was adopted by a positive vote of 7 members . . . Thus 7 . . . members . . . out of a committee of 21, made fundamental last-minute changes in a bill on which the Committee had labored for months on end. . . .

". . .

"But now at the eleventh hour and the fifty-ninth minute, the Committee proposes an amendment thereto, the text of which was not presented to the Committee until last Friday morning. Those favoring the amendment . . . state that its terms are simple, . . . yet, this 'simple' amendment requires three and one-half pages of closely typed text so involved and complicated as to require the services of a corps of Philadelphia lawyers, certified public accountants and statisticians for a clear understanding . . . (Congressman Buck, *op. cit. supra*, p. 9192). (emphasis added)

". . .

". . . As the bill is presented to you on the floor it is not the bill that the majority of the Committee hoped to see passed by the House." (Congressman Bonner, *op. cit. supra*, p. 9193.)

explained in H. Rept. No. 831.[65]) Despite this drastic amendment of Section 9, however, which resulted in the two versions of Section 9 being quite different and not comparable on this issue, the lower courts erroneously referred to and quoted from the Committee report made *before* the amendment.[66]

The Senate Committee on Commerce was, at that time, holding hearings on S. 292, and on December 4 (legislative day, October 29), 1945, made its report,[67] in which the Committee recommended a bill striking all the provisions after the enacting clause of H. R. 3603 as passed by the House and containing a substitute version similar to former S. 292.[68] H. R. 3603, as so amended and recommended by the Senate Committee, was adopted by the Senate. The bills (H.R. 3603 and the Senate amendment of H.R. 3603) were then referred to a Conference Committee. The bill, as reported and recommended to both the House and the Senate by this Committee[69] was adopted by both the House and the Senate as Public Law 321, effective March 3, 1946.[70]

"Mr. Chairman, if the House adopts this amendment, it will be acting without benefit of knowledge, without benefit of analysis. Under these circumstances the amendment should be defeated" (Congressman Buck, *op. cit. supra*, p. 9283).

[65] See pp. 12-13 of H. Rept. No. 831; 91 Cong. Rec. (Part 7) 9185 (comments of Congressman Jackson), 9192 (comments of Congressman Buck), 9194 (memorandum of Congressman Bonner), 9197, 9199 and 9282 (comments of Congressman Jackson), 9283 (comments of Congressman Bradley).

[66] See Delaware Court in *National Bulk*, p. 592, and notes 26 and 31 thereon; also Third Circuit, p. 410 (lengthy quotation from Report).

[67] S. Rep. No. 807, 79th Cong., 1st Sess., Committee on Commerce, to accompany H. R. 3603, dated December 4, 1945.

[68] Appendix B, *infra*, B-78.

[69] See Conf. Rep. No. 1526, 79th Cong., 2nd Sess., to accompany H. R. 3603, dated February 6, 1946.

[70] Appendix B, *infra*, B-96.

The lower courts also referred to and relied upon the Senate Report, which, like the House Report, concerned a Section 9 which was quite different from that contained in the bill as finally adopted.[71]

(b) The lower courts erroneously interpreted the legislative history of Section 9 and arrived at the wrong conclusion as to its purpose and effect.

Petitioner contends that a correct analysis of the legislative history of Section 9 will conclusively show (1) that

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[71] See Delaware Court in *National Bulk*, p. 592, and notes 27, 29 and 30; also Third Circuit, p. 410. In fact, the Delaware Court drew the following conclusion (pp. 592-3):

> "The logical conclusion to be drawn from both the House and Senate reports is that at all times, the Congress had only one idea in mind—to treat the Section 9 applicants as if they purchased on the date the Act was passed."

This in the clear face of the fact that Section 9 in both original H. R. 3603 and Senate amendment to 3603 provided for the fiction that for purposes of an adjustment in the price of a vessel sold prior to the Act, the Act will be considered to have been in effect *at the time of the sale*. See Appendix B, *infra*, B-57 and B-90. In fact, in H. Rept. 831 the Committee explained Section 9 as follows (at p. 12): "The effect of making the adjustment is the same as if the bill had been enacted at the beginning of the war period and all sales during the war period had been at the statutory sales price." This shows the fallacy and danger of improper use of legislative materials.

Under similar circumstances, the Court of Appeals for the Second Circuit had the following to say in *U. S.* v. *Lincoln Rochester Trust Co.*, 297 F. 2d 891, 892-3 (1962) *cert. denied*, 369 U. S. 887 (1962): ". . . The District Court relied on House Report No. 1027, 85th Cong., 1st Sess., 1957, which accompanied H. R. 8881, passed by the House which contained a specific provision that although the surviving spouse must have the authority to give the property away it need not include the power to dispose of the property by will. H. R. 8881, however, never became law as written and passed by the House. H. R. 8381 which became Section 92(a) of the Technical Amendments Act of 1958, made no mention of the issue. The language referred to in this report relied on by the District Court was not included in the Act as it finally was adopted. No reliance can therefore be placed on this portion of the Report in interpreting the Act."

application of Section 9 will not, and was not intended to, reduce the adjusted price to the statutory sales price, (2) that the sponsors of amended Section 9 (as adopted) had only the immediate cash effect on the Government in mind and that there was *no* Congressional "intent" as to the effect of the Section 9 price adjustment on the tax basis of such a vessel, and (3) that the sponsors could not have intended, as the lower courts held, to put pre-Act and post-war purchases on an *equal* basis for all purposes, including tax cost, since this is impossible; but that the most Congress hoped for was to place them on a *comparable* basis as to cash effect and to be *fair*. The lower courts arrived at the opposite conclusion as to each of these points and, in doing so, grievously erred.

An analysis and study of the comparable provisions of Section 9 in the final bills considered, rejected, amended and adopted by the two Houses of Congress may be helpful in resolving the issue at hand.[72] First, with minor exceptions, Section 9 of H. R. 3603, as originally proposed by the House Committee, and Section 9 of the Senate amendment of H. R. 3603 (like S. 292) were very similar. It was only upon the amendment of Section 9 of H. R. 3603 on the floor of the House which amended Section 9 was included in the bill as passed by the House and as adopted subsequently by both Houses, that that section differed materially as to provisions and effect from Section 9 of both original 3603 and Senate amendment of 3603. Since the provisions and plan of original 3603 and Senate amendment of 3603 are

[72] A comparison of the provisions of Section 9 of original 3603 (as recommended by the House Committee), of H. R. 3603 (as passed by the House), of the Senate amendment to 3603 (as recommended by the Senate Committee and passed by the Senate), and of P. L. 321 (the Act as enacted) is attached as Appendix C, *infra*.

materially similar, the comparison will then be between 3603, as amended and adopted in the House (referred to for convenience as the "House bill"), and Senate amendment of 3603 (referred to for convenience as the "Senate amendment") (with comments as to changes from both in the Act as enacted).

Section 9 of the House bill contained four subsections, whereas there were six subsections under Section 9 of the Senate amendment. Subsection (a) of both are the same, and subsection (d) of the House bill is quite similar to subsection (f) of the Senate amendment. Therefore, these will be ignored in this discussion. Subsection (b) of the House bill and subsection (c) of the Senate amendment shall be referred to as the "adjustment sections" since they provided for the price adjustment. Subsection (c) of the House bill and subsection (d) of the Senate amendment shall be referred to as the "conditions sections" since they imposed condition upon the acceptance of the price adjustment. The House bill had no counterparts to subsections (b) and (e) of the Senate amendment.

The "adjustment section" of the Senate amendment provided that the "amount of the adjustment under this section shall *be* the excess of" followed by only two paragraphs, the first of which simply sets out the original purchase price of the vessel, depreciated or amortized to the date of enactment of the Act, and the second of which sets out the statutory sales price of the vessels, as of the date of enactment of the Act, with certain adjustments. The difference between the two paragraphs is such excess and is the amount of the adjustment. However, the "adjustment section" of the House bill contained eight paragraphs, each of which entered into, and was a material part of, the determination of the "amount of such adjustment." It

was in this version that for the first time the price adjustment to be secured by an owner did not reduce the purchase price to an amount equal to the statutory sales price.

In the "conditions section" of the Senate amendment, there are four paragraphs as compared to three paragraphs in the "conditions section" of the House bill. The major points of difference are four. First, the House bill contained no provision similar to paragraph (4) of the Senate amendment (but this is not important in the issue at hand). Second, paragraph (1) of the Senate amendment provided for a *refund* to the Government of charter hire paid by it in excess of 15% of adjusted price.[73] Third, all limitation for use or loss of a vessel was based on "adjusted purchase price" in the Senate amendment and on "statutory sales price" in the House bill. Last, paragraph (1) of the House bill provided for the tax effect of certain (but not all) adjustments to be made in the "adjustment section."[74]

Under the Senate amendment, there were two computations, one in the "adjustment section," which was an adjustment in the purchase price (consisting of (1) a reduction in the balance of the mortgage indebtedness, if any, and the application thereagainst, if there were such a mortgage indebtedness, of any cash refund due to the applicant, or (2) a cash refund if there were no mortgage indebtedness or if any cash remained after satisfaction of the mortgage indebtedness), and the other in the "conditions section," which was a computation of the excess charter hire to be

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[73] In the House bill the computation of excess charter hire was provided for in the "adjustment section," rather than in the "conditions section" as in the Senate amendment.

[74] In the Senate amendment *all* tax provisions were contained in a completely separate subsection of Section 9 (subsection (e)).

refunded by the owner to the Government, less certain credits thereagainst at the option of the owner.

Under the House bill, all computations were included in the "adjustment section," except the recomputation of the taxes of the applicant for the tax years between the year of acquisition of the vessel whose price is being adjusted and the year of the enactment of the bill. After this computation was made, however, it became *one* of the components under the "adjustment section" of the House bill, along with the credit for excess payments made on the purchase price, the adjustment in the mortgage indebtedness, the charter hire credits between applicant and the Government, and the interest credit to the applicant, *all* of which, when netted together, gave *the* adjustment in price and all of which affected, and were a part of the determination of, the basis of the vessel.

Taxes were handled in an entirely separate subsection of the Senate amendment, as to both computation and effect. In the House bill, the computation of taxes was covered in paragraph (1) of the "conditions section," and the effect of such tax computation was covered in paragraph (8) of the "adjustment section." This made clear that, although the tax computation was a condition, its effect was a part of the adjustment in price. Because the House bill treated the sale of any vessel prior to the date of the enactment of the Act as taking place on the latter date, the tax adjustment provisions of the House bill related only to certain events and to the period occurring between the date of original purchase and the date of enactment of the Act; whereas, since the Senate amendment was written on the theory that the Act was in effect at the time of the original purchase and that the original purchase was made under

its terms, the tax provisions of the Senate amendment provided for the redetermination of taxes in *all* tax years from and after delivery of the vessel to the purchaser, and specifically provided that, for the purposes of redetermination of income and excess profit taxes, the vessel "shall be considered as having been acquired at the adjusted purchase price." Thus, the Senate amendment specifically provided for the tax basis of a vessel whose original purchase price was adjusted under the Act; whereas, the House bill, although providing for certain recomputations in taxes, which then became an item in the adjustment of price, did not specifically provide for the new tax basis of a vessel whose price was adjusted.[75]

Congress, in considering and adopting the Act, was free to adopt an act in the form of the Senate amendment or one in the form of the House bill. The applicant would have been bound by the form of such bill either in applying for an adjustment in price or, thereafter, in determining the effect of such adjustment. That the tax effect to an applicant would be different under the two forms of bills does not alter the situation. The fact that Congress selected and adopted one bill should preclude the tax officials from determining the tax basis of the vessels in

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[75] Also, in the Senate amendment, a specific provision was made as to the disposition of the refunds resulting from such redetermination. Paragraph (2) of Section 9(e) of the Senate amendment gave the applicant the option to apply any refund against the remaining mortgage indebtedness in lieu of being credited or refunded to the applicant. However, in the House bill, the overpayment or deficiencies in taxes resulting from the computations in the tax provision of the House bill became one of the credits or factors in the formula used for determining the adjustment in price. See Appendix C, *infra*, C-9.

question in accordance with the other bill considered but rejected by Congress.[76]

Considering H. R. 3603, as originally proposed, the amendment of Section 9 of H. R. 3603 on the floor of the House, of the Senate amendment for H. R. 3603, and the Act as finally adopted (with the changes made by the Conference Committee in the two bills as adopted separately by the two Houses), it can easily be seen that Section 9 of the Act was radically different from that section in the bills as orginally proposed and considered by the Committees of each House and on which the reports of each house were based. No longer was Section 9(b) to apply as if the Act had been in force at the time of the original purchase of the vessel; no longer were the transactions that occurred between the purchase of the vessels and the time of the enactment of the Act (such as charter hire paid, interest paid on original mortgage indebtedness, taxes computed on the basis of such charter hire and of depreciation based on the original purchase price) to be unwound; rather, the vessel was to be treated as having been purchased at the time of the enactment of the Act and the original purchase price of the vessel was to be adjusted in accordance with a formula which took into consideration not only the adjusted statutory sales price, in relation to the original purchase price, but other factors which were measured by events occurring between the original purchase and the enactment of the Act (as part of the formula however, by which the adjustment was determined and not by a separate provision as a condition for making an adjustment).

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[76] What was said of the taxpayer in *Curtis* v. *Commissioner*, 89 F. 2d 736, 738 (8th Cir., 1937) can be applied here to the Government: "... In this situation we must consider and follow what he did and not what he might have done..."

What is the difference to the Government and to Petitioner in the results under the Senate amendment and under the House bill, with respect to (a) the tax basis of a vessel whose purchase price is adjusted, and (b) the cash effect of the adjustment on the Government? With respect to the tax basis of a vessel, there is no doubt that under the Senate amendment, by reason of a specific provision, it would have been the adjusted purchase price; whereas, under the House bill, lacking such a specific provision, the tax basis of the vessel would be determined under the normal Code rules. With regard to the cash effect of the adjustment on the Government, such cash effect would be materially less under the House bill than under the Senate amendment. This is most important because the cash effect, not the tax effect or the tax basis, is the sole intent and purpose of the amendments to the House bill offered on the floor of the House. The sole specific "intent" of the Congress with regard to the price adjustment was to the cash effect on the Government not to the tax effect or cost basis to the applicant.

This is emphasized by the different methods of handling the adjustments between the Senate amendment and the House bill. Had the cash effect of the adjustments under the Senate amendment been the same as under the House bill, the resulting tax effect or basis would have nevertheless been different because the cash effect under the Senate amendment did not determine the tax basis (the latter being otherwise specifically provided for); whereas, under the House bill, such cash effect being a part of the adjustment in price, any reduction in such adjustment in the House bill would result not only in a reduction in the cash effect,

but also in a reduction in the adjustment in price and, therefore, a higher tax basis.[77]

This logically explains the following remarks of Congressman Jackson in the debate on the floor of the House on the proposed amendments to H. R. 3603, and particularly of Section 9:[78]

> "There has been a feeling that the amount of the adjustment provided for in section 9 of the bill as reported is too high. The committee amendment *seeks to cut down the amount of this adjustment* and at the same time to be perfectly fair to all concerned—those who bought before the enactment of the bill, those who bought after the enactment of the bill, and the United States.
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[77] The adjustment measured by charter hire paid by the Government on a vessel whose price is adjusted is a prime example of this difference. In the House bill, the applicant "shall *credit* the Commission with *all* amounts paid by the United States to him as charter hire for the use of the vessel." (Paragraph (6), Section 9(b)). However, under the Senate amendment the applicant would be required to *refund* to the United States any charter hire paid by the Government in excess of 15% per year of the adjusted price. (Under the House bill, there would be offset against the total charter hire to be credited to the Government the amount of charter hire that would have been paid by the Government to the applicant on any vessel traded in on the purchase of the vessel whose price is being adjusted (Paragraph (6), Section 9(b). There was, of course, no corresponding credit to the applicant under the Senate amendment, inasmuch as the Senate amendment still treated the sale—and therefore the trade-in—as having taken place on the date of delivery of the vessel.) The net effect, as to Petitioner, of the differences in treatment of charter hire, can be seen in computation XIII, Appendix E, *infra*, E-4. The cash difference or effect on this one item alone is $3,380,328.30 (When this is applied to all applicants for adjustment and to all vessels subject to such adjustment, it can be easily seen that there was a substantial cash effect (in the form of savings) on the Government in the approach of the House bill as contrasted with that of the Senate amendment.)

[78] 91 Cong. Rec. 9436-7 (Part 7) (October 2, 1945).

> ". . . The *amendment reduces the amount of the adjustment under section 9 substantially* and is fair to all concerned.
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> "I might say incidentally that the adjustments under the bill as originally reported out amounted to $89,000,000.00. That included a scaling down of mortgage indebtedness owing to the Maritime Commission and a small amount of cash. This amendment reduces that adjustment to the owners down to $68,000,000.00 or a *total saving of $21,000,000.00.*" (emphasis added).

All concerned with the bills recognized that legally and morally the Government had to make some adjustment for prior purchases. However, the fears of the cost of such adjustments to the Government and the questions raised by differences in the views of and the effects on foreign and domestic owners, tankers and dry-cargo vessel owners and subsidized and non-subsidized owners permeated the hearings and the debates on the bills. Although the prime object was a healthy merchant marine and the need for a stable price policy for disposition of Government owned vessels to private operators, underlying all discussions on statutory sales price and adjustments in previous purchases was the net return or cost to the Treasury. This was the primary concern of the Congress and fashioned its "intent" with regard to Section 9, an intent, therefore, directed to the cash immediate effect on the Government and not to tax effect or cost basis on vessels whose prices might be adjusted.[79]

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[79] Nowhere in the Committee reports or in the debates is any reference made specifically to the question at hand, the tax cost or basis of a vessel whose original purchase price is adjusted. In

The bills, as adopted in the House and in the Senate, went to a Conference Committee, which reported out a substitute for both bills.[80] Just as in the debates, occurring in explanation of the amendment to Section 9 on the floor of the House, the statement of the House managers attempts to simplify the explanation of the provisions of the bill and the recommendations of the Conference Committee.[81] Such explanations must then be read carefully in the light of the differences between the House bill, the Senate amendment and the Conference Committee substitute (subsequently adopted by the Congress). The managers attempted in non-technical language and as briefly as possible to set out the differences between the House bill and the Senate amendment as to Section 9 and concluded by saying (at p. 17) that the "conference agreement restores the House provisions on the points stated in the two preceding paragraphs."

It is interesting to note that, whereas in the House bill paragraph (2) of Section 9(b) had cancelled the mortgage indebtedness and provided for a new mortgage indebtedness, paragraph (2) of Section 9(b) of the Conference

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Federal Trade Commission v. *Sun Oil Co.*, 371 U. S. 505, 517, 83 Sup. Ct. 358, 9 L. Ed. 2d 466 (1963), this Court stated: "While such language in the congressional materials suggests the reading limiting Sec. 2(b) to the meeting of the seller's own competition, it is, of course, not conclusive since not directed to the specific problem here presented. Neither the briefs nor the arguments of the parties nor of the amici have pointed to any more explicit congressional guide to resolution of the precise question before us. No more can be said than that there appears to be nothing in the legislative history to directly contradict what we deem to be the ordinary meaning of the statutory language or to indicate that a different reading was specifically intended; what few guides there are support the interpretation we here adopt."

[80] See Conf. Rep. No. 1526, 79th Cong., 2d Sess. (1946).

[81] *Op. cit. supra,* note 80, pp. 17-18.

bill provided only that applicant's mortgage indebtedness "shall be adjusted" and paragraph (3) Section 9(b) of the Conference bill referred to "the adjusted mortgage indebtedness" rather than to "the new mortgage indebtedness" as in the House bill. This change negated any possible idea of the rescission of the old purchase agreement, and further specifically provided that such adjusted mortgage indebtedness shall be payable in equal annual installments thereafter during "the remaining life of such mortgage," a new provision. This language indicates clearly that it was not the intent of Congress to rescind the original transaction and to substitute a new one as of the date of enactment of the Act, as contended by the Government.[82]

Two other actions of the Conference Committee in recommending language used in the House bill over that in

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[82] The Third Circuit held (p. 412) that "... the foregoing legislative materials and statutory scheme clearly manifest a Congressional intention to effect a rescision of a prior contract of sale, and an adjustment in price to the statutory sales price." Considering the legislative history of the Act, the regulations and the various agreements between the parties it can hardly be said that the previous contracts and mortgages had been annulled, abrogated, cancelled or rescinded. If the Act had provided that the original purchase contracts and all documents in connection therewith were to be annulled, cancelled and rescinded, and new contracts entered into, in which the purchase price of each vessel would be the adjusted statutory sales price, then there would be no doubt that there would be a rescision rather than an adjustment. The mere fact that the Act provided that such adjustment shall be made ... by treating the vessel *as if* it were being sold to the Applicant *on the date of the enactment of this Act* ... does not mean that for all purposes (such as existing mortgages or existing charters), all previous contracts and relationships were to be rescinded or annulled. No new notes, mortgages or charters were made by Petitioner to replace those in effect on March 8, 1946. The effect of the difference between rescission and adjustment is illustrated by the case of *The Borrin Corporation* v. *Commissioner*, 39 B. T. A. 712 (1939), aff'd 117 F. 2d 917 (6th Cir., 1941), cert. denied 314 U. S. 638 (1941).

the Senate amendment may throw some additional light on the issue here. In the Senate amendment, under the "conditions section," the applicant must agree that the liability of the United States under any charter party for use and loss of the vessel shall be determined on the basis of "the adjusted purchase price" (with certain furtner adjustments). The corresponding provisions in the "conditions section" of the House bill provided for the same limitation of liability (except for additional depreciation for war service) but based on "statutory sales price."[83]

The Conference bill restored the House version on these points.[84] Thus, the bill, as adopted, used the term "statutory sales price" instead of the term "adjusted purchase price." The only explanation for the adoption of the language in the House bill is the fact that under the House bill the adjusted purchase price of a vessel would be different from the statutory sales price.[85] This is a clear recognition of the difference in the approach and effect of the

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[83] See comparison in Appendix C, *infra*, C-7 and C-8.

[84] Omitting the additional 3 per centum per annum war service depreciation, however.

[85] Although the term "adjusted purchase price" is not defined in the Senate amendment, it is used only in subsections (d) and (e) after the "adjustment section" and therefore logically refers to the adjusted purchase price specified in subsection (c). It is clear that under the Senate amendment the adjusted purchase price would be the statutory sales price. However, that would not necessarily mean that this price would be the tax basis for such vessel and so the Senate amendment specifically provided in subsection (e) ("tax section") that it would be. If the adjustments under the "adjustment section" of the House bill resulted in an "adjusted purchase price" equal to the "statutory sales price," then there would have been no need to use the House bill language in lieu of the Senate amendment language. See, however, the opposite conclusion reached by the Delaware Court in *National Bulk*, pp. 585, 591: "If the new price is not the statutory sales price, this provision is without meaning."

two bills. The effect of the adjustment in the Senate amendment would be to make the adjusted purchase price the same as the adjusted statutory sales price. However, since none of the adjustments in the House bill were treated separately as mere conditions of obtaining the adjustment but were made a part or a measure of the adjustment itself, the presence of cash credits or adjustments in that section of the House bill, other than the credit pertaining to the cash payments in excess of 25% of the statutory sales price (contained in both the House bill and the Senate amendment), would cause the adjusted purchase price to differ from the adjusted statutory sales price. This is the point contended for by Petitioner and is supported by the action and recommendation of the Conference Committee and of the two Houses in adopting the Conference bill.

Also, as previously pointed out, Section 9(e)(1) of the Senate amendment specifically fixed the tax basis of a vessel, whose original purchase price was adjusted, at the "adjusted purchase price." No comment is made in the Conference Report as to why this provision was omitted in the final bill. However, it does not appear in the Act, as adopted, and there is no similar specific provision anywhere in the Act. There can be only one inference from this omission. Either the matter was overlooked by the Congress in the consideration of the differing bills and in the recommendation of the Conference Committee as to the bill to be enacted, or the Congress intentionally left the tax basis of such vessels to be determined under the usual rules of the Internal Revenue Code then in effect, after giving effect to the adjustment in price under Section 9(b) of the Act.[86] Since the Senate considered this matter and made a

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[86] See *Western Union* v. *Lenroot*, 323 U. S. 490, 500-1, 65 Sup. Ct. 335, 89 L. Ed. 414 (1944).

recommendation on the point, which was before the Conference Committee, it could hardly be said to have been overlooked. As pointed out very ably by Circuit Judge Cameron, dissenting in the Fifth Circuit (at p. 134):

> "When Congress intended that its acts authorizing the redetermination of the price of ships purchased under our various subsidized ship procurement programs would also determine the basis of property in a manner differing from Section 113(a), *supra*, or would determine other factors affecting income tax liability of purchasers, it has always said so specifically." (citing examples in the footnotes thereto).[87]

The lower courts made as a major premise for their conclusions a Congressional intent to put pre-Act and postwar purchasers on an *equal* basis.[88] The myriad factors involved in attempting to equalize such purchasers mitigate against any such intent. In addition the impossibility of achieving any such result confirms no such intent would have been either reasonable or likely. Finally, the resulting legislation falls so far short of even attempting to achieve full equality that this major premise seems demonstrably erroneous by reference to the statutory provisions about which there is no controversy.

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[87] See also the lengthy comment on this point by Judge Madden in the *Socony* case, at p. 913.

[88] Fifth Circuit (at pp. 132-3): ". . . It was clearly the intention of Congress to put pre-enactment purchasers and post-enactment purchasers on the same basis, that of the statutory sales price. The Delaware Court (at p. 591): "After studying the legislative history of Section 9, one inescapable conclusion concerning legislative intent appears. Congress meant to put pre-Act and postwar purchasers on exactly the same basis—their shoes were to be interchangeable. Using this fact as a major premise, it becomes clear that all buyers were to pay one price, the statutory sales price . . ."

In fact, fairness, not equality, was the most that could be hoped for. This was a most complex and difficult piece of legislation and Section 9 posed problems in addition to those faced in the other sections of the Act. The views of the shipping industry were quite divergent as were those of the members of Congress who worked on the legislation. The results were a compromise of interests and views.[89]

Section 9 was included in the Act because all recognized that purchasers of vessels prior to the Act would suffer

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[89] "Section 9 of H. R. 3603 provides for a refund to operators who purchased vessels during the war at war cost, . . . Such an adjustment is *fair* . . . However, Section 9 contains many loopholes, which in my opinion places the wartime purchaser in a far better position than future purchasers . . . If there is to be *equality* between past and future purchasers there must be *comparable* terms and nothing less . . ." (91 Cong. Rec. 9182, Part 7, Congressman Jackson)

". . . Whether the provisions of the bill are the best possible in this respect, nobody can say, but I feel perfectly confident in saying that no one is likely hastily to improvise anything better." (91 Cong. Rec. 9197, Part 7, Congressman Jackson)

"There has been a feeling that the amount of the adjustment provided for in Section 9 of the bill as reported is too high. The Committee amendment seeks to cut down the amount of this adjustment and at the same to be perfectly *fair* to all concerned—those who bought before enactment of the bill, those who bought after the enactment of the bill, and the United States.

". . . The amendment reduces the amount of the adjustment under Section 9 substantially and is *fair* to all concerned." (91 Cong. Rec. 9282, Part 7, Congressman Jackson)

". . . Provisions to allow such adjustment were included in the bill. They have been the subject of considerable controversy as to proper implementation of the admitted desirability of proper adjustments to place prior purchasers and postwar purchasers of similar vessels on a *comparable* basis . . . Again, the Committee has resolved these discussions in a manner which it believes to be *fair* to the Government and to the parties concerned. The amount involved under different plans has been subordinated in the minds of the Committee to the desirability of arriving at *fair* adjustments, but at the same time the Committee has not found it practicable to provide adjustments which would satisfy to the fullest extent the natural desires of every private purchaser the most favorable treatment in the light of his particular situation." (S. Rep. No. 807, *supra*, note 67, p. 6)

"an unwarranted discrimination unless the price at which they purchased or agreed to purchase these vessels is adjusted to conform to the statutory sales price prescribed in the bill."[90] The problem was how to do this and at the same time "to put everybody on the same basis as of the date of the enactment of the legislation."[91] The lower courts evidently felt that Public Law 321 achieved this purpose (according to the Government's and their interpretation) but only if the statutory sales price should be the tax basis for a vessel purchased prior to the Act and whose original purchase price was adjusted under the Act. No criticism is intended of Congress in noting that there were many ways other than price in which those purchasing prior to the Act suffered economic disadvantages in comparison with those purchasing under the Act. It simply indicates that there was no way to completely equalize such purchasers or to put them in *exactly* the same position. The following discussion simply points out a few of the more important elements not taken into consideration in the Act.

An applicant was given no credit or allowance (1) for State income taxes paid by applicant on the charter hire received prior to the enactment of the Act and credited to the Commission under paragraph (6) of Section 9(b),[92] (2) for depreciation on any vessel traded in and of which, under the fiction of Section 9, he was treated as the owner until the date of enactment, and (3) for any interest

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[90] H. Rep. 831, *supra*, note 62, p. 12.

[91] Words of Congressman Bradley, 91 Cong. Rec. 9438, Part 7.

[92] In the State of Alabama alone, a corporation income tax of 3% was imposed on Petitioner in the years in question. Title 51, Section 398, Code of Alabama (1940).

on overpayment of taxes credited to applicant under paragraph (8) as computed under Section 9(c)(1) of the Act, as is the usual case in the refund of taxes.

An applicant was given no allowance or credit for normal overhead or fixed cost, which resulted or accrued by reason of Petitioner's having been the actual owner of the vessel during the period between purchase and date of the Act.[93]

The liability of the United States for use or loss of any vessel under charter to it, whose original purchase price was adjusted under Section 9(b) of the Act, would be limited to 15% per year of the statutory sales price of such vessel for use, and to statutory sales price less depreciation to date of loss for loss. However, as to any vessel purchased after enactment of the Act, the owner thereof would not be limited as to either the amount of charter hire due for use or to the amount of compensation due for loss of such vessel.[94]

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[93] Evidently, this was on the assumption that the entire charter hire paid by the Government to the applicant was clear profit and the return or credit of the same to the Government did not result in applicant's absorbing any cost attributable to the ownership of the vessels during that period prior to the Act. However, during the period in question, these vessels were subject to the property taxes assessed and levied by the State of Alabama, the domicile or home port of these vessels having been in Mobile, Alabama. (R. 149) Title 51, Section 21, Code of Alabama (1940). However, if the Senate amendment had been enacted, applicant would have at least received charter hire on 16 vessels at the rate of 15% per annum on the statutory sales price, thereby covering that and similar such costs.

[94] In the 83rd Congress, 1st Session, H. R. 7065 and S. 1918 were introduced to amend Section 9(c)(2) and (3) of the Act so as to correct this inequity. Hearings were held before the Committee on Merchant Marine and Fisheries of the House and before the Committee on Interstate and Foreign Commerce of the Senate. The Senate Bill was approved by the Senate on May 4, 1954 but no action was taken in the House. In the next Congress, H. R. 8352 and S. 3113 were introduced, this time to amend Section 9(c)(2) of the Act only, with the provision, however, that it would not be

Petitioner was required to pay the adjusted mortgage indebtedness over the remaining life of the original mortgages (16 years and 4 months as to the *Fairisle* and 20 years as to the John B. Waterman (R. 163).[95] However, anyone purchasing under the Act and after its enactment would have been entitled to pay the balance due on the purchase price, after payment of 25% of the statutory sales price, over a 20-year period, thereby giving such purchaser a longer period of pay-out with lower annual payments and at the low interest rate of 3½%.[96]

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retroactive in application but would apply only to any charter party executed on and after a specific date. This bill became law on August 6, 1956 (c. 1013, 70 Stat. 1068, 50 U. S. C. App. Section 1742 (c) (2)).

[95] Actually because payments were continued to be made in the amounts called for by the original mortgages, which were in excess of the payments on the adjusted mortgage indebtedness, which excess under the Interim Agreement, Article XVI, could be applied against such unpaid mortgage instalments as designated by Petitioner, certain mortgages by such application were paid in full prior to the date of the Final Agreement among which was the *Fairisle*. (R. 163) However, even as to the *Warrior*, the payments were spread over a period of 17 years and 4 months, rather than the full 20 years.

[96] Under the House bill, which cancelled the old mortgage indebtedness, the pay-out period of a pre-enactment purchaser would have been the same as a post-enactment purchaser. However, this was amended in conference. Although in the Final Agreement, by reason of the desire of Petitioner to fully apply all available Section 112(f) funds on the purchase prices of the applicable vessels and thereby avoid a tax on such funds, the net cash credit to Petitioner was, in effect, paid to Petitioner by means of reduction in its mortgage indebtedness, this would not have been the case under the Interim Agreement nor would it have been allowed as a result of the Independent Offices Appropriation Act, 1948, 61 Stat. 585, 604, *supra*. Even though, by applying this amount against the remaining adjusted mortgage indebtedness, Petitioner saved interest at the rate of 3% on such mortgages to the extent of such application, Petitioner, doubtless, could have earned a higher return than 3½% on such cash credits. One purchasing after the date of the Act would not have been required to make this additional cash payment.

The income of an applicant was increased disproportionately in the taxable year in which March 8, 1946 fell by reason of treating all of the interest and all of the charter hire credited to the applicant under paragraphs (5) and (6) as having been received in that year under the provisions of Section 9(c)(1) of the Act, instead of accruing such credits ratably over the years in which actually accrued, which was the manner of treatment as to the interest in the House bill, but which was changed in conference.[97]

A very major difference and disadvantage would be the fact that any pre-enactment purchaser who benefited from the ownership of a vessel during that period by either chartering the vessel to someone other than the Government or who used the vessel to carry his own commodities[98] did not have to account for such earnings by giving a credit to the Commission for such earnings as in the case of a similar purchaser whose sole return from the vessel was the charter hire paid by the Government. These earnings could be used to apply against the purchase price of the vessel without affecting the tax cost or basis of such vessel. However, according to the Government's contention, the credit to the Commission for charter hire paid by the Government will not be treated as a part of the price adjustment and, therefore, of the cost of the vessel.

Thus, by no stretch of the imagination can one say that a pre-Act purchaser, whose original purchase price of a vessel purchased prior to the Act was adjusted thereunder,

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[97] See Conf. Rep. No. 1526, *supra*, note 69, p. 17.

[98] See *Socony Mobil Oil Co.* v. *United States*, 279 F. 2d 512, 515 (Ct. Cls., 1960) where, of the 12 vessels purchased prior to the Act and whose prices were readjusted under the Act and which were chartered to the Government, 8 were released from the charter in November, 1945, some 5 months prior to the date of enactment of the Act, during which period they were available for charter or for use by Socony Mobil Oil Co.

and a postwar purchaser stood in the same shoes. Thus, if these two purchasers did not occupy the same position with respect to the above situations, then there is no reason to infer that they should be in the same position with regard to the tax basis of their respective vessels. In the circumstances, only a specific and clear provision to that effect in the statute would have accomplished such a result. Rather than saying, as did the Delaware Court (p. 593), that a "decision for the taxpayer would be contrary to the equitable principles that motivated the Congress to act," it can be said that a decision for the taxpayer here would not only be in accord with the wording of the statute, the intent of Congress and the established principles of the Code but would help overcome some of the inequities accruing to the pre-Act purchasers under the Act.

(c) Having looked to the legislative history of the Act, the lower courts erred in failing to consider the legislative history subsequent to the Act.

The lower court recognized that subsequent expression of opinion by a legislative body as to the meaning of a statute may be an important aid in interpreting that statute.[99] However, both the Delaware Court and the Third Circuit held that the rule announced in *Fogarty* v. *United States*, 340 U. S. 8, 71 Sup. Ct. 5, 95 L. Ed. 10 (1950) precluded such subsequent legislative history from consideration.[100] However, it is respectfully contended that, under the circumstances, *Fogarty* does not apply and that the subsequent legislative history is admissable under the holding of *Sioux Tribe of Indians* v. *United States*, 316 U. S. 317,

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[99] Delaware Court, p. 593, note 36.

[100] The majority in the Fifth Circuit made no mention of this evidence or rule in its brief opinion. However, Circuit Judge Cameron in his dissent (at p. 135) differed on this point.

62 Sup. Ct. 1095, 86 L. Ed. 1501 (1942), in which this Court said (pp. 329-330):

> "This statement by the Committee which reported the General Allotment Act of 1887, made within five years of its passage, is virtually conclusive as to the significance of that Act . . ."

It must be recalled that this excursion into the legislative history of the Act, and particularly Section 9(b), is taken supposedly because the statutory language is either not definite or perhaps ambiguous with regard to the issue in point here. As an aid in the statutory interpretation or construction of this section, extrinsic matters are being considered. *Sioux Tribe* applies only to allow the subsequent legislative history, here Committee reports and debate on an amendment of the very statute whose construction is in issue (which amendment was adopted) to be considered in determining the intent of the Congress at the time the original Act was enacted. *Fogarty* held only that, if there is a way of ascertaining the intent of the Congress *contemporaneous* with the enactment of the legislation in question, subsequent events need not be studied. Petitioner maintains that either (1) the statutory language of Section 9 is clear and unambiguous in that it contains no provision specifying the tax basis of a vessel whose price is adjusted and, therefore, such basis must be determined under the normal rules of the Code, or (2) the legislative history, including prior bills, Committee Reports, debates on the floor of the Congress, bills considered and not enacted, and proposed amendments to bills relative to Section 9, clearly indicates no intent that the statutory sales price be the tax basis, or, if Petitioner not be correct in these, (3) that the legislative history prior to the enactment of the Act indicates no contemporaneous intent of Congress as to the

tax basis of a vessel whose price was adjusted under Section 9, and, therefore, resort may be had to subsequent legislative history, which does not supplant, but rather supplies, the contemporaneous intent of the 79th Congress which enacted the Act. Therefore, *Fogarty* does not apply and *Sioux Tribe* does.[101]

(d) Subsequent legislative history clearly demonstrates the error of the lower courts and of the Government with regard to Congressional intent that the statutory sales price be the tax basis of a vessel whose original purchase price is adjusted pursuant to Section 9.

In 1949, the Treasury Department, through the office of the Commissioner of Internal Revenue, issued Mimeograph 6366, dated February 18, 1949,[102] in which that Department stated, in Paragraph 8 thereof, that:

> "For Federal tax purposes, on and after March 8, 1946, the basis (unadjusted) under Section 113(a) of the Internal Revenue Code, of a vessel on which an adjustment under Section 9 of the Act has been made is the statutory sales price as determined by the Commission under the Act."

In the Congress in session when Mimeograph 6366 was issued, a bill, H. R. 3419, was introduced, to amend the Merchant Ship Sales Act of 1946 by adding the following paragraph at the end of Section 9(b):

> "From and after March 8, 1946, the cost basis of a vessel in respect of which the price adjustment is

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[101] The Delaware Court appears to base its holding on this point on the fact that *Fogarty* came after *Sioux Tribe*. See note 36 at p. 593. However, *Sioux Tribe* was cited in the decision of *Federal Housing Authority* v. *The Darlington*, *supra*, p. 28, which was decided after *Fogarty*.

[102] 1949-1 Cum. Bull. 270.

made shall be the undepreciated original purchase price reduced by the net amount of such adjustment in favor of the applicant resulting from the application of all the foregoing provisions of this subsection."

This bill was considered by the Committee on Merchant Marine and Fisheries of the House (the Committee with the same jurisdiction as the one which had considered H. R. 3603) and recommended for adoption.[103] The following excerpts appear in that Committee Report:

> "The purpose of this bill is to clarify section 9 of the Merchant Ship Sales Act of 1946 with regard to the proper cost basis for depreciation purposes of war-built vessels sold by the United States Maritime Commission prior to the enactment of the act." (p. 1)
>
> "Your committee has been informed through hearings held recently that in most, if not all cases, the operation of the *adjustment provisions* of section 9 *never actually results in a net cost to the purchaser as low as the statutory sales price* which he would have had to pay if he had purchased the vessel after the enactment of the act. Notwithstanding this fact, however, the Bureau of Internal Revenue holds that for determining the cost basis for purposes of depreciation the 'statutory sales price' shall be taken as a criterion, not *the actual net cost to the purchaser*. The effect of this, of course, is that the prior purchaser whose price was adjusted under section 9, is allowed lower depreciation charges than he would normally be able to claim on the basis of the *actual net amount paid for the vessel* . . ." (p. 2) (emphasis added)

Then, under the heading "Recommendation" (p. 2) the Committee Report states:

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[103] See H. Rep. No. 1342, 81st Cong., 1st Sess., dated September 27, 1949, to accompany H. R. 3419.

> "Since the provisions of section 9 appear to be ambiguous and as interpreted by the Bureau of Internal Revenue result in inequities to those citizens who purchased war-built vessels prior to the enactment of the Act (*a result which was not intended when the act was originally passed*), your committee believes this amendment should be enacted." (emphasis added).

H. R. 3419 was passed by the House on October 3, 1949 and in the Senate was referred to the Committee on Interstate and Foreign Commerce (the committee with jurisdiction similar to the one which had considered H. R. 3603 and S. 292), which Committee also reported the bill with a favorable recommendation.[104] The following excerpts are taken from that Committee Report:

> "The purpose of this bill is to clarify a possible ambiguity in the Merchant Ship Sales Act of 1946 with regard to the proper cost basis of war-built vessels sold by the United States Maritime Commission prior to March 8, 1946, the date of enactment of that statute, and whose original purchase price has been adjusted under section 9 of the act." (p. 1)

> "The Merchant Ship Sales Act of 1946 provided for the sale of war-built vessels owned by the United States and suitable for commercial use. In that act, a formula was prescribed for determining the 'statutory sales price' of various types of vessels to be sold thereunder. In fairness to those who had already purchased the same type vessels during the war years, frequently in response to the urging of the Maritime Commission, it was provided in section 9 of the act that these prior purchasers should be entitled to certain specified adjustments in the prices they originally agreed to pay for such vessels. Such

[104] See S. Rep. No. 1915, 81st Cong., 2d Sess., dated June 27 (Legislative Day, June 7), 1950, to accompany H. R. 3419.

action fulfilled the assurances given to many prior purchasers, usually incorporated in the original contracts of purchase, that they would be given the benefit of any price reductions contained in any subsequent ship sales legislation. . . ." (p. 1)

"Section 9 proposes to treat the vessel sold prior to March 8, 1946 as if they were being sold on that date and not before. *A formula is provided for determining the adjustment.* A *series* of debits and credits are set forth, *the net effect of which is to arrive at an adjusted price for the vessel. . . . The final result is that the adjusted purchase price is the original purchase price less the net price adjustment.* However, *these adjustments almost never result in a net cost of the prior purchaser as low as the 'statutory sales price.'* In most cases, if not all, this adjusted purchase price is considerably higher than subsequent purchasers are required to pay for identical type ships under the Ship Sales Act.

"This bill does not increase the amount of adjustments to be given to prior purchasers under the Merchant Ship Sales Act of 1946. It does not seek to change the *price-adjustment formula.* Its purpose is to clarify a possible ambiguity in the provision of this statute, and to insure to prior purchasers seeking adjustment under section 9 that *the adjusted purchase price is the proper depreciable cost basis of the vessel* as of March 8, 1946, which amount can be depreciated over the remaining life expectancy of the vessel.

"As indicated by the House Committee on Merchant Marine and Fisheries' Report on this bill (Rept. No. 1342), enactment of this legislation *would be in accord with the intent of Congress in enacting section 9* of the Ship Sales Act. Furthermore, this conforms to established accounting practices in that the prior purchaser's depreciable cost

will be his actual cost, and not the lower statutory sales price, of which he has never received the benefit.

"As previously stated, the operation of the *formula in section 9* is such that the adjusted purchase price is higher, and often very much higher, than the statutory sales price at which similar vessels were sold to others, including foreigners, after the date of enactment of the Ships Sales Act. The Bureau of Internal Revenue has indicated that, under the present wording of the Ship Sales Act, persons who purchased vessels prior to the enactment of the Ship Sales Act and received an adjustment under section 9 of that statute should use the 'statutory sales price' as their cost basis rather than their *actual 'adjusted purchase price' under the formula provided by section 9.*. Such an interpretation has the effect of largely nullifying the intent and purpose of the adjustment provisions of that act and of depriving these prior purchasers of the adjustment benefits Congress intended . . ." (p. 2) (emphasis added).

The proposed amendment was adopted in that form by the Senate. However, H. R. 3419 was vetoed by President Truman after Congress had adjourned. In his veto message to Congress[105] the President stated (p. 15792):

"In order to accord prior purchasers a parity of treatment with those buying vessels subsequent to passage of the act, section 9(b) prescribes certain procedures by which a prior purchaser voluntarily may obtain adjustments in his original price. . . . The net effect of these adjustments has usually been in favor of the government so that *the adjusted obligation of the prior purchaser has been somewhere between the price which he originally paid for the*

[105] 96 Cong. Rec. 15791-2, Part 11 (November 27, 1950).

vessel and the statutory sales price." (emphasis added).

In vetoing the bill, the President expressed concern that this method of handling would not be equitable and suggested another approach in lieu thereof. However, this does not detract from the fact that both Houses of the Congress and both Committees of these two Houses which had previously considered and recommended the Act expressed their opinion and belief (in both the Committee reports and in the adoption of the proposed amendment based on these reports) that it was not the original intent of Congress that the basis of a vessel whose original purchase price had been adjusted under Section 9 was to be the statutory sales price. This expression occurred within three and one-half years (in the House) and four and one-half years (in the Senate) after the adoption of the Act. The effect of this subsequent legislative history as evidence of Congressional intent is clearly within the holding of *Sioux Tribe, supra.*

6. If Congress had intended what the lower courts and the Government erroneously say it did, it would have said so specifically as it has in other similar cases.

As pointed out by Circuit Judge Cameron dissenting in the Fifth Circuit, when Congress has desired that the basis of vessels be determined in a manner different from Section 113(a) it has always said so specifically. He pointed to Sections 510 and 511 of the Merchant Marine Act, 1936.[106] In S. 292 and in the Senate amendment of H. R. 3603 the Senate specifically provided for the tax consequences of the adjustment, not just between the years of original purchase and the year of the Act as in the Act, but

[106] See note 1 at p. 134.

for all years subsequent to original purchase.[107] It is dangerous to draw inferences from failures to act or omissions by Congress but there certainly is no basis for inferring here that Congress intended a result which would have inevitably followed from Section 9(e)(1) of the Senate Amendment when it, in considering that bill with the House bill, adopted a bill without a similar provision. Unfortunately, the Conference Report makes no mention of Section 9(e)(1) and why it was omitted from the Conference bill.

This was quite properly recognized and accorded its proper interpretation by the Court of Claims in the *Socony* case.

> "This legislative history shows that the committees of Congress gave minute attention to the tax consequences, current and future, of the readjustment authorized by section 9. The bill as enacted by the Senate had in it an express provision that the statutory sales price should be the basis for future depreciation. The conference omitted this provision, and the Act as passed omitted it. There is no room for an implication that Congress, having considered and omitted it, showed, by other parts of section 9, an intent to retain it." (at p. 913).[108]

This is just another indication of the attempt by the Government to convert the effect of Section 9 of the Act into an act not only different from the one enacted but one that was considered, but rejected, by Congress.

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[107] Section 9(e)(1) of Senate amendment of H. R. 3603. Appendix C, *infra*, C-9.

[108] To the same effect, see, the Alabama Court's opinion at pp. 292-30.

Conclusion.

In conclusion it is respectfully submitted that the Fifth Circuit erred (a) in overruling the Alabama Court and in holding that the tax basis, for purposes of depreciation, of the 18 vessels owned by Petitioner was not the actual economic cost of those vessels to Petitioner but rather was their artificially contrived or hypothetical statutory sales price; (b) in failing to apply the usual and normal Internal Revenue Code provisions and rules applicable in determining the tax basis of the 18 vessels of Petitioner; and (c) in its findings and conclusions, in the face of the clear mandate and language of Section 9, with regard to the Congressional intent as to Section 9(b), its application and particularly the effect thereof to the tax basis of the 18 vessels of the Petitioner. Petitioner also respectfully contends that the reasoning and conclusion of the Alabama Court and of the Court of Claims in the consolidated cases of *Socony*, were in all respects correct and proper in their interpretation of the application and effect of Section 9(b) of the Act and the resolution of the issue of the proper tax basis of such property.

For these reasons and on the basis of the arguments herein made, Petitioner respectfully requests that the decision of the Fifth Circuit be overruled and the judgment of the Alabama District Court be sustained and reinstated as to the issue for which the writ of certiorari was granted.

Respectfully submitted,

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February 19, 1965

Proof of Service.

I, John W. McConnell, Jr., the attorney of record for Petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of February, 1965, I served a copy of the foregoing Brief of Petitioner with separate Appendices by personal service on each of the following attorneys of record for the United States of America in their offices in the Department of Justice, Washington, D. C.:

1. The Honorable Archibald Cox, Solicitor General
2. The Honorable John B. Jones, Acting Assistant Attorney General
3. The Honorable I. Henry Kutz and David I. Granger, Attorneys, Department of Justice.

JOHN W. MCCONNELL, JR.